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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTONIO DEINDE FERNANDEZ,

Petitioner,

—v.—

BARBARA J. FERNANDEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

I. Whether Article 31 1(a) of the Vienna Convention on Diplomatic Relations, which provides a narrow exception to the broad rule of diplomatic immunity for "real actions relating to private immovable property . . . ," gives a state court jurisdiction over an ambassador's real property in a divorce action—an action in which (a) the real property will be awarded based not on any claimed title rights *per se*, but rather on *in personam*, equitable distribution criteria that have no relevance to legal title, and (b) the inquiry required to make such a distribution will deeply intrude into the ambassador's personal affairs?

II. Whether a state court, having assumed jurisdiction over a divorce action involving an ambassador only by way of a Limited Waiver of Diplomatic Immunity extended pursuant to Article 32 of the Vienna Convention to permit "a dissolution of the marital status only," can disregard that express limitation and make an equitable distribution award of the ambassador's real property to his spouse as part of a divorce judgment?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Antonio Deinde Fernandez, Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique, and the respondent, Barbara J. Fernandez.

The United States Department of Justice, as *amicus curiae*, filed a brief with the Connecticut Supreme Court.

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OCTOBER TERM, 1988

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—v.—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Antonio Deinde Fernandez, Ambassador, Deputy Permanent Representative at the Permanent Mission of the Peoples' Republic of Mozambique to the United Nations, respectfully prays that a writ of certiorari issue to review the decision of the Connecticut Supreme Court entered in the above-captioned proceeding on July 19, 1988.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 208 Conn. 329, 545 A.2d 1036, and is reprinted in the Appendix hereto, p. 2a, *infra.*

The memorandum decision of the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut (Novack, J.), which was the trial court in this matter, has

not been reported. It is reprinted in the Appendix hereto, p. 22a, *infra*.

JURISDICTION

The decision and judgment of the Supreme Court of Connecticut were entered on July 19, 1988. (p. 2a, *infra*). In that decision, a majority of the Court found no error in the October 13, 1987 decision of the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut. On September 20, 1988, the Connecticut Supreme Court denied a timely Motion for Reargument and Clarification of its decision. (p. 1a, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. United States Constitution, Article III:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . .

2. United States Constitution, Article VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

3. Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11, section 15:

(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

. . .

. . . shall . . . be entitled in the territory of the United States to the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it.

4. Vienna Convention on Diplomatic Relations, opened for signature April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. (Entered into force with respect to the United States of America December 13, 1972).

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

. . . .

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. The Diplomatic Relations Act, § 5, 22 U.S.C. § 254d (1982):

> Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual . . . .

6. General Statutes of Connecticut § 46b-81 (1987):

> (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or the wife all or part of the estate of the other.
>
> . . .
>
> (c) In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes of the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

STATEMENT OF THE CASE

The petitioner, Antonio Deinde Fernandez, is the Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique, and has been accredited as such by the Department of State of the United States of America. By virtue of his position, and pursuant to applicable provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat.

3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (the "Headquarters Agreement") and the Vienna Convention on Diplomatic Relations, *opened for signature* April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (the "Vienna Convention"), Ambassador Fernandez is immune from all criminal, civil and administrative jurisdiction in the United States with the exception of three very specific types of claims.[1]

Despite the Ambassador's diplomatic immunity, Mrs. Fernandez, in January, 1987, commenced a divorce action against him in the Connecticut Superior Court. Prior to serving papers on the Ambassador, Mrs. Fernandez obtained several *ex parte* prejudgment remedies, including an $8,000,000 attachment of the Ambassador's real and personal property. (p. 4a, *infra*). The attachment was executed against the Ambassador's residence in Connecticut.

Upon learning of the lawsuit and the *ex parte* orders, Ambassador Fernandez, in March, 1987, filed a motion to dismiss the entire action for lack of personal jurisdiction and to vacate all the prejudgment remedy orders. That motion was based on the Ambassador's status as an accredited diplomatic agent and the resultant privileges and immunities accorded him thereby under the Vienna Convention. (p. 2a, *infra*). Additionally, the motion was based on the mandate of section 5 of the Diplomatic Relations Act, 22 U.S.C. § 254d, which provides that: "Any action or proceeding brought against an individual who is entitled to

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1 In this regard, Article 31 of the Vienna Convention provides in part:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed." Motion to Dismiss and memorandum in support thereof and October 6, 1987 Transcript at 51 through 56.

Hearings on the motion were held on September 14, 1987 and October 6, 1987. At the latter hearing, the Associate Chief of Protocol of the United States Department of State testified to the Ambassador's status as Ambassador, Deputy Permanent Representative at the Permanent Mission of the People's Republic of Mozambique to the United Nations. The Associate Chief of Protocol testified further that the Ambassador had been accepted as such by the United States Government on February 1, 1985 and that he continued to enjoy that status. October 6, 1987 Transcript at 22-25.

The Connecticut Superior Court, in a Memorandum of Decision entered on October 13, 1987, found that Ambassador Fernandez was a diplomatic agent and "entitled to diplomatic immunity from all civil and administrative proceedings." (p. 25a, *infra*). However, the Superior Court then held that, under Connecticut's local law, divorce actions were not civil actions but rather "family relations matters" for which the Vienna Convention provided no immunity. Accordingly, the Superior Court concluded that the Ambassador's "diplomatic immunity does not extend to this dissolution action," and that he was personally amenable to jurisdiction in this matter. (p. 26a, *infra*). As a postscript and in the alternative, the Superior Court ruled that, even if it lacked personal jurisdiction over the Ambassador because of his diplomatic immunity under the Vienna Convention, it still had jurisdiction over the marital *res* under Connecticut's local law and could, therefore, grant a divorce in this action. (p. 26a-27a, *infra*). Based on this reasoning the Superior Court denied the Ambassador's motion to dismiss. (*Id.*).

On October 27, 1987, Ambassador Fernandez filed a petition pursuant to section 52-265a of the Connecticut General Statutes, which provides for direct and expedited appeals to the

Connecticut Supreme Court of actions involving substantial public interest, seeking permission to appeal directly to the Connecticut Supreme Court from the denial of his motion to dismiss. On October 28, 1987, that petition was granted and the Connecticut Supreme Court certified the appeal.

During the pendency of the appeal before the Connecticut Supreme Court, the Government of the People's Republic of Mozambique delivered a Limited Waiver of Immunity ("Limited Waiver") to the United States Department of State. A copy of the Limited Waiver was annexed to the Ambassador's brief to the Connecticut Supreme Court. (p. 6a, n.7, *infra*). In pertinent part, the Limited Waiver provided:

> Pursuant to Article 32 of the Vienna Convention on Diplomatic Relations, the People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relations to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said Court, encaptioned *Fernandez v. Fernandez*, docket number FA-87-0085485-S. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from *in personam*, *in rem* or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding.

(*Id.*).

While on appeal, the United States Department of Justice was granted permission to, and filed, an *amicus curiae* brief. In that brief, they argued that the trial court had erred in asserting jurisdiction over the Ambassador. First, the Department of Justice pointed out that divorce actions were clearly intended to be within the scope of immunity afforded ambassadors under the Vienna Convention's immunity from civil jurisdiction. Secondly, it noted that "the mere fact that real property might be involved in the ultimate resolution of this suit does not bring it within the real property exception of Article 31." Brief for United States as *Amicus Curiae* at 6 n.3.

In a decision entered on July 19, 1988, after an *en banc* hearing, the Connecticut Supreme Court acknowledged the Ambassador's diplomatic status and held that the trial court erred in asserting jurisdiction over all facets of the case on the notion that a divorce action is a "family relations" action rather than a "civil" action. In reaching this result, the Court stated:

> Article 31 of the Vienna Convention provides that a "diplomatic agent shall enjoy immunity from the . . . civil and administrative jurisdiction" of the receiving state. The negotiating history of the Convention supports a broad reading of this language. . . . Further, *the record reveals an explicit awareness by the drafters that marital dissolution proceedings were prohibited by the Convention.*

(p. 8a, *infra*, emphasis added).

As set forth above, the People's Republic of Mozambique filed a Limited Waiver of Immunity while the matter was on appeal to the Connecticut Supreme Court. That Limited Waiver permitted the Connecticut superior court "to enter an order dissolving the marital status only" between the Ambassador and Mrs. Fernandez but clearly and specifically prohibited its use for any further orders. Referring to that waiver, a majority of the five Justices of the Connecticut Supreme Court stated that the matter would have to be remanded in any case for an adjudication of the marital status question. Then, despite the clearly restricted language of the Limited Waiver and its own recognition that marital dissolution proceedings were prohib-

ited by the Convention, the Connecticut Supreme Court reviewed Mrs. Fernandez' complaint to determine whether any of the other substantive or remedial relief requested therein could be granted.

In so reviewing Mrs. Fernandez' complaint, the Court described part of the remedy sought therein as follows: "[i]ncident to the dissolution, the plaintiff requests an assignment 'of all of *defendant's* right, title and interest in certain real property located at 27 Oaley [sic] Lane, Greenwich, Connecticut.' " (p. 3a, *infra*, emphasis added). On appeal, Mrs. Fernandez argued that this claim should be permitted to proceed against the Ambassador under one of the exceptions to immunity set forth in Article 31, *i.e.*, the so-called "real action" exception. In this regard, paragraph 1(a) of Article 31 provides the immunity afforded diplomatic agents does not apply with respect to "a real action relating to private immovable property . . . ." With respect to this assertion and "the intended scope of the language of the exception," the Court quickly recognized, "*we face a question of first impression.*" (p. 11a, *infra*, emphasis added). In resolution of this question, the Court held that Mrs. Fernandez' claim to the Ambassador's real property was a permissible real action under Article 31 and stated that on remand "it is for the trial court to determine whether to grant the plaintiff title to the disputed real property." (p. 14a, *infra*).

The Court referred to two principal grounds for its conclusion. First, the Court reasoned that the language of the exception "raises the sole question of whether the real property is *itself* the disputed object of the litigation." (p. 12a, *infra*). Observing that "[t]he substance of [Mrs. Fernandez'] claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution," the Court considered this to be an action where the real property was the object of the litigation. (*Id.*).

Secondly, the Court stated that the "overriding emphasis of the Convention is functional" and that the justification for the immunity provided for therein was the need to safeguard the actual functioning of the diplomatic mission. Quoting from one

commentator on the Vienna Convention, the Court wrote that the drafters of that Convention had attempted to balance the need to protect the diplomat and the conflicting need to minimize abuse in formulating the scope of diplomatic immunity under the Vienna Convention as well as the exceptions from that immunity. The Court provided no further articulation or analysis as to what significance, if any, the perceived functional underpinning of immunity had with respect to this case. (p. 13a-14a, *infra*).

Finally, the Connecticut Supreme Court held that, on remand, the trial court would not have authority to award Mrs. Fernandez any support payments or other ancillary monetary relief. Mrs. Fernandez had argued that jurisdiction to consider such monetary claims sprang not from any provision in the Vienna Convention but from "her alleged due process right of access to a judicial forum for a resolution of all disputes arising out of a marital dissolution," citing *Boddie v. Connecticut*, 401 U.S. 371, 377-79 (1971). (p. 15a, *infra*). The Connecticut Supreme Court, however, refused to extend *Boddie* to require, not only a right of access to dissolve a marriage but also, a constitutional right of access to obtain proprietary relief incident to the divorce where such relief was otherwise barred by diplomatic immunity. (*Id.*).

Two Justices dissented in part from the majority opinion. They stated that the trial court lacked jurisdiction over "all of the plaintiff's claims that expressly invoke the authority of the court under our marital dissolution statutes to grant relief beyond the dissolution of the marriage itself, a remedy to which the defendant's [the Ambassador's] waiver expressly assents." (p. 20a-21a, *infra*). In their view, jurisdiction under the "real action" exception of Article 31 was limited to adjudicating the *present* interests of the parties in the Connecticut property; jurisdiction did not extend to Mrs. Fernandez's claim under state law that she was entitled to an assignment of all or any part of the Ambassador's property as an incident of the marital dissolution. (p. 18a, *infra*).

On September 20, 1988, the Connecticut Supreme Court denied the Ambassador's timely filed Motion for Reargument and Clarification. (p. 1a, *infra*).

STATEMENT AS TO FINALITY

The fact that the Connecticut Supreme Court remanded this case to the trial court for further proceedings does not affect or destroy the finality of the Connecticut Supreme Court's judgment for purposes of 28 U.S.C. § 1257(a). That Court has made a final determination, binding on the remand proceedings, that by virtue of paragraph 1(a) of Article 31, the Ambassador is not immune from the jurisdiction of the state court to resolve what it held to be a "real action."

The thrust of the defense of diplomatic immunity, like a defense of sovereign immunity, is that the diplomat is immune from any assertion of jurisdiction over his person or property, whether on remand or otherwise. *See Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (upholding the immediate appealability of the denial of a claim of sovereign immunity, stating: "[a] foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity."). Like an absolute prosecutorial immunity, diplomatic immunity is an entitlement not to stand trial or submit to jurisdiction at any stage of a proceeding. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). As this Court wrote in *Mitchell*:

> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, *it is effectively lost if a case is erroneously permitted to go to trial.* Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Id. at 526-27 (emphasis added).[2]

In the instant case, the Connecticut Supreme Court's denial of the Ambassador's claim of immunity, as in *Mitchell v. Forsyth*, "finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegation." Absent immediate review of the Ambassador's claim of immunity, that immunity will, *de facto*, be lost forever.

REASONS FOR GRANTING THE WRIT

I.

This Case Is One Of Only Two Types Of Controversies Deemed Sufficiently Significant By The Framers Of The United States Constitution To Merit This Court's Original Jurisdiction

This is a case "affecting Ambassadors, other public Ministers and Consuls." As such, the case intrinsically partakes of the special significance that led the Framers to place this kind of case within the original jurisdiction of this Court.

Congress has seen fit, of course, to make this aspect of original jurisdiction non-exclusive in nature, thus recognizing that state courts have concurrent jurisdiction over cases affecting ambassadors. 28 U.S.C. § 1251(b)(1). Such concurrent jurisdiction, however, does not diminish the special, international flavor of this case as it comes to this Court by way of certiorari to the Connecticut Supreme Court.

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2 *See also Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (holding a decision relating to proper venue to be immediately appealable as a prevention "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (holding a decision relating to *quasi in rem* jurisdiction to be immediately appealable, this court noted, "if the judgment below were considered not to be an appealable final judgment, 28 U.S.C. § 1257(2), appellants would have the choice of suffering a default judgment or entering a general appearance and defending on the merits."); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

Indeed, whether an ambassadorial case arises out of this Court's original or appellate jurisdiction, the Framers presumably intended that such a case be finally resolved by this Court. The dignity of foreign states and their ambassadors demands that resolution of their privileges and obligations under international treaties and conventions not be left to the judicial vicissitudes of our fifty State Supreme Courts. Foreign dignitaries and their sovereigns are not likely to give a Connecticut Supreme Court interpretation of Article 31 and 32 of the Vienna Convention very much respect. Only this Court can speak with authority on such matters, which is precisely why the Framers put such cases within the original jurisdiction of this Court.

II.

The Decision Below Presents An Important Case Of First Impression With Respect To The Scope Of Diplomatic Immunity Under Article 31 Of The Vienna Convention

Article 31 of the Vienna Convention shields diplomatic agents with total immunity from criminal, civil and administrative jurisdiction in the receiving state with three narrow exceptions, only one of which is here germane. This case involves an interpretation of that one exception—the exception pertaining to "a real action relating to private immovable property situated in the territory of the receiving state . . . ."[3] With respect to that interpretation, this case, as the Connecticut Supreme Court realized, presents an important question of first

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3 It should be noted, however, that, based on the record before the Connecticut Supreme Court, this case never involved a real property claim that was cognizable under paragraph 1(a) of Article 31 in the first place. Mrs. Fernandez never claimed she held title to the real estate at issue. (p. 4a, *infra*). Rather, title to the real estate was in a corporation that the Ambassador controlled and with respect to which Mrs. Fernandez claimed a stock ownership. In an affidavit before the trial court she attested: "This home is owned by Santa Barbara Estates U.S.A., Inc. This entity is controlled by my husband." (*Id.*).

A claim based on an alleged interest in the stock of a corporation that holds real estate as an asset is simply not a "real action."

impression.[4] (p. 11a, *infra*). There are no published cases construing this exception. Moreover, as at least one commentator on the Vienna Convention remarked: "The wording of Article 31(1)(a) contains several ambiguities, not all of which can be satisfactorily resolved by examination of the travaux preparatoires." E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations*, 155 (1976). Continuing, the commentator observed: "There was no discussion of the meaning of 'real action' at any stage of the preparation of the Vienna Convention." *Id.* at 161.

In spite of the lack of articulation by the drafters of the Vienna Convention as to the meaning of this exception, it is clear that the exception was never intended to open a back door to permit *in personam* divorce actions against diplomatic agents who are immune from such actions in the first place.[5] Rather, the exception was intended to cover actions *in rem* relating to

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4 The importance of the case is attested to by the Connecticut Supreme Court's expedited review of the trial court's decision under section 52-265a of the General Statutes of Connecticut, as well as by the *amicus curiae* involvement of the United States Department of State before the Connecticut Supreme Court.

5 That diplomatic agents are immune from divorce actions under the Vienna Convention could not be more clear. Such was the result in *Shaw v. Shaw*, 3 W.L.R. 24, 3 All E.R. 1 (Fam. Div. 1979), the only reported decision counsel for either party were able to find adjudicating a claim of immunity under the Vienna Convention in the context of a divorce case. Moreover, the drafters of the Vienna Convention left no doubt that this was their understanding as to the scope of the diplomatic immunity set forth in the Vienna Convention. *See, Report of the International Law Commission to the General Assembly*, [1956] II Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (observation during discussion on immunity from civil jurisdiction that "the *prestige of States* demands exceptional protection, particularly in those cases in which the Courts would have to discuss *delicate private affairs* (family matters; publicity of the procedure; publication in newspapers, etc.)" (Emphasis in original)); and *Summary Records of the 402nd Meeting*, [1957] 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/SER.A/1957 (observing during discussion on scope of immunity intended under treaty language providing immunity from "civil

real property. *Id.* at 159-60. Indeed, the very term "real action" means an action brought for the specific recovery of lands based on direct right to the land. In this regard, one commentator has written:

> All actions, says [Bracton], are either *in rem*, *in personam*, or mixed. *Fleta and subsequent writers converted their phrases in rem and in personam into the terms real and personal.*
>
> . . .
>
> . . . Primarily the action *in rem* lies to enforce such rights as are available not against a particular individual, but against the whole world. *But it has another meaning—that of an action directed against the thing itself.* The action *in rem* is therefore either an *impersonal* action or an action against a thing.

3 Street, *Foundations of Legal Liability*, 37-38 (1906) (Footnotes omitted, emphasis added).

A recurring definition of the term "real action" provides that:

> Real actions were based upon the plaintiff's, or demandant's as he was called, *right of property* in the specific thing which was the subject of controversy, his *dominium*; they were brought to establish this ownership, and

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jurisdiction" that—"[t]he immunity of the diplomatic agent was maintained even in the apparently unrelated matter of divorce, because a divorce action under the local jurisdiction was incompatible with his dignity as a diplomat."). *See also Tsiang v. Tsiang*, 194 Misc. 259, 86 N.Y.S.2d 556 (N.Y. Spec. Term 1949); *Anonymous v. Anonymous*, 44 Misc.2d 14, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964); *Carrera v. Carrera*, 84 App. D.C. 333, 174 F.2d 496 (D.C. Cir. 1949) (all of which involved dismissals of family matters prior to the adoption of the Vienna Convention but for the same fundamental reasons that prompted the drafters of the Vienna Convention to include family matters within the scope of civil jurisdiction from which diplomatic agents are immune).

> sometimes his right of possession against an adverse claimant who had taken possession and asserted ownership. In this respect they were identical with and plainly copied from the group of actions in the Roman law termed "vindications" (*vindicationes*), but differed from the latter in being confined to lands.

Pomeroy, *Remedies and Remedial Rights by the Civil Action*, 14 (1876) (emphasis added). Accordingly, "a real action is only available to one out of possession *who can prove an estate in the realty that entitles him to recover possession.*" *Lewien v. Cohen*, 432 A.2d 800, 802 (Me. 1981) (emphasis added).[6] It is the right to property based on title rights, not some indirect, *in personam* divorce claim based on the quality of the marriage, the health of the parties, etc., that is the basis of a "real action."

Mindful of this distinction, the drafters of the Vienna Convention concluded that the exception to the broad rule of diplomatic immunity set forth in Article 31 1(a) for "real actions" was not contrary to the Vienna Convention's underlying purpose for extending diplomatic immunity in the first place, *i.e.*, "to insure the efficient performance of the functions of diplomatic missions." Vienna Convention, Preamble. For such proceedings, involving vindications of title only, would necessarily operate in an *in rem* fashion not involving the diplomatic agent personally. Indeed, such was the reasoning of the United States Department of State in its instructions to the United States delegation to the 1961 United Nations Conference in Vienna in which it wrote: "[S]ince actions respecting real property are usually *in rem*, it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the proper performance of his diplomatic functions." Position Paper Prepared for the United

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6 *See* Dean, *Summary of the Law and Practice of Real Actions*, 85 (1868); *Farrands v. Melanson*, 438 A.2d 910, 913 (Me. 1981) (real action at common law based on *title* right); *Board of Commissioners v. Hunter*, 354 So.2d 156 (La. 1977) (real action based on *title* to the demanded premises).

States Delegation to the United Nations Conference on Diplomatic Privileges and Immunities, *cited in* 7 M. Whiteman, *Digest of International Law*, 407 (1970).

In spite of the well considered, *in rem* basis for the "real action" exception to diplomatic immunity, and in spite of the manifest intent of the drafters of the Vienna Convention to protect diplomatic agents from deeply personal divorce suits, the Connecticut Supreme Court, nonetheless, seized upon the "real action" exception as a basis for, in effect, asserting *quasi in rem* jurisdiction over the Ambassador. For under that Court's decision, the Superior Court will have jurisdiction to award the Ambassador's real property based not on title rights, but rather based on *in personam*, statutory state divorce criteria. Indeed, permitting an award of a diplomatic agent's real property in the context of a Connecticut divorce action would result in an award of real property that, under section 46b-81 of the Connecticut General Statutes, would have to be based on "*the length of the marriage, the causes for the . . . dissolution of the marriage . . . , the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income*"—factors that are not even remotely related to the real property at issue or in whom its title is properly vested, but factors that do require the deepest intrusion into the Ambassador's most personal affairs—factors that would directly challenge the prestige and dignity of the diplomat.

In essence, the result achieved by the Connecticut Supreme Court is a *de facto* abolishment of a diplomat's immunity from divorce suits—proceedings that even the Connecticut Supreme Court recognized were "prohibited by the Convention"—under the rationale that, because real property is the ultimate object of the litigation such suits are permissible after all under Article 31. Such a result is worse than the tail wagging the dog; such a result is nonsense. Obviously, the types of cases in which a diplomatic agent's real property may be the ultimate object of the litigation or so claimed in satisfaction of a truly *in personam*

action, by attachment or otherwise, is limited only by the creativity and persuasiveness of counsel here and abroad.

Nor does the Court's conclusionless discourse on a perceived functional underpinning for the "real action" exception lend any rationality to the result. For, the drafters' intention that diplomatic agents be immune from divorce actions was based on the fundamental precept that local jurisdiction over divorce actions that inevitably involve delicate private affairs was incompatible with the diplomatic agent's dignity. There is absolutely no indication from the drafters that they believed that this fundamental precept should be compromised and delicate private affairs pried into simply because real property could be involved by way of matrimonial award. Indeed, the drafters must have been aware in extending immunity to divorce actions in the first place that divorce actions frequently involve real property claims.

Critical of the majority's perversion of Article 31 1(a), the dissent wrote:

> *I believe the power of the court under the "real action" exception to determine the interests of the parties in the residence cannot be deemed to include the authority* given under General Statutes § 46b-81 to a court when dissolving a marriage to "*assign to either the husband or the wife all or any part of the estate of the other,*" which the plaintiff has expressly invoked in her prayer for relief, as the quotation from the majority opinion implies. . . . *If the court were to exercise the authority to assign the defendant's interest in the residence to the plaintiff pursuant to § 46b-81, as she seeks, the concern of the Convention that the immunity of a diplomat be preserved in a divorce action because such a proceeding "under the local jurisdiction was incompatible with his dignity as a diplomat" would be wholly frustrated.* 1 Y.B. Int'l L. Comm'n 97 (1957).

(p. 18a-19a, *infra*, emphasis added).

Absent sound judicial guidance from this Court to the effect that the exception is intended only for the purpose of litigating

title to property based on title rights, this exception will become the guise under which divorce actions, as well as a multitude of other truly *in personam* claims, are brought against diplomatic agents.

III.

The Decision Below Presents An Important Question With Respect To The Effect Of A Waiver Of Immunity Under Article 32 Of The Vienna Convention

The immunity from civil jurisdiction set forth in Article 31 of the Vienna Convention clearly includes immunity with respect to divorce actions.[7] Accordingly, under the mandate of section 5 of the Diplomatic Relations Act, 22 U.S.C. § 254d, this action should have been dismissed outright. For, as provided in that statute: "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . *shall be dismissed.*" (Emphasis added).

In the interest, however, of providing Mrs. Fernandez with a local forum in which she could dissolve her marital status, the People's Republic of Mozambique executed a Limited Waiver of Immunity. The conditional nature of that waiver, its limitations, restrictions and purpose were clearly set forth in the body of that waiver. The waiver was made "*to the following limited and restricted extent only*, viz: to permit the Superior Court . . . *to enter an order dissolving the marital status only* between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez . . . ." (Emphasis added). The Limited Waiver expressly reserved all incidents of immunity over the person and property of the Ambassador, stating:

> This limited and restricted waiver of diplomatic immunity does not encompass . . . any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity . . . from *in personam*, *in rem* or any other type

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7 See n.5, *supra*.

> of jurisdiction whatsoever with respect to his person or property . . . .

(p. 6a, n.7, *infra*). Under the terms of the Limited Waiver and based on Connecticut's "no fault" divorce statute, a dissolution of the marital *res* could be achieved without the delving into fault and numerous other personal areas which a Connecticut divorce court is mandated to consider in making an award of alimony or property under Connecticut's broad, equitable distribution marital dissolution statutes.

Such was the status of this matter before the Connecticut Supreme Court. Absent the Limited Waiver, the Connecticut courts would have no jurisdiction to enter a divorce in this matter and under the terms of the Limited Waiver, the Connecticut courts could go no further than to enter an order of dissolution of the marital status only. The waiver expressly proscribed its use as a mechanism for the entry of any other orders.

In spite of the unambiguous language of the Limited Waiver of Immunity, the Connecticut Supreme Court, once it had jurisdiction under the Limited Waiver, undertook an analysis that incredibly concluded by authorizing the very result proscribed by the Limited Waiver. In this regard the Court wrote:

> After the filing of this appeal, the People's Republic of Mozambique executed a limited waiver, as is its prerogative under Article 32 of the Convention, permitting the Superior Court "to enter an order dissolving the marital status only" between the plaintiff and the defendant . . . . *The only question before us is whether, on remand, the trial court will have authority to award the real and personal property the plaintiff claims in her complaint.*

(p. 5a-7a, *infra*, footnotes omitted, emphasis added). Turning next to plaintiff's complaint and the requested assignment therein "of all of *defendant*'s right, title and interest in certain real property located at 27 Oaley [sic] Lane, Greenwich, Connecticut," (emphasis added) and then combining that request for relief with an unfounded and unprecedented construction of one of the exceptions to diplomatic immunity set forth in

Article 31 of the Vienna Convention, as discussed *supra*, at 13-19, the Court ruled that "it is for the trial court to determine whether to grant the plaintiff title to the disputed [Ambassador Fernandez'] real property." (p. 14a, *infra*).

In other words, what the Connecticut Supreme Court has done, in a manner that will undoubtedly have international repercussions, is to take a Limited Waiver of Immunity extended under Article 32 of the Vienna Convention by a sovereign nation, use it for the creation of *in rem* divorce jurisdiction and then totally disregard the plain language set forth in that Limited Waiver to improperly enhance its jurisdiction to *quasi in rem* jurisdiction. Saliently critical of this misuse of the Limited Waiver, the dissent below wrote: "Because the waiver is effective only for the purpose of dissolving the marriage, however, it cannot serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage under our statutes." (p. 17a, *infra*).

This case, then, involves questions of first impression with respect to what import must be accorded a sovereign nation's waiver made under Article 32. If the result reached by the Connecticut Supreme Court is left uncorrected, nations will justifiably regard the waiver provision of Article 32 of the Vienna Convention as a house of mirrors promoting unpredictable distortions of any waivers extended. Such a result is in diametric opposition to the very purpose of the Vienna Convention "to insure the efficient performance of the function of diplomatic missions as representing states." This case presents an opportunity to restore predictability to the waiver provisions of the Vienna Convention so that nations may be assured that waivers granted by them will be honored according to their terms.

CONCLUSION

For all of the above reasons, Ambassador Fernandez respectfully prays that a writ of certiorari issue in this case.

Respectfully submitted,

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OF COUNSEL:

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December, 1988

APPENDIX

SUPREME COURT
STATE OF CONNECTICUT

September 20, 1988

No. 13283

BARBARA FERNANDEZ

—vs.—

OLADEINDE FERNANDEZ

ORDER

The motion of the defendant, filed July 29, 1988, for Reargument and Clarification, having been presented to the Court, it is hereby

ORDERED denied.

BY THE COURT,

CAROLYN CURBA ZROGOS
Assistant Clerk-Appellate

NOTICE SENT: Sept. 20, 1988.
DUEL & HOLLAND
CUMMINGS & LOCKWOOD
MICHAEL JAY SINGER, pro hac vice
MARK B. STERN, pro hac vice
FRANK H. SANTORO, A.U.S.A.
HON. STANLEY NOVACK
CLERK, SUPERIOR COURT, S/N
FA-87-0085485 S
REPORTER OF JUDICIAL DECISIONS

gf

Decision of the Connecticut Supreme Court

SUPREME COURT
STATE OF CONNECTICUT

July 18, 1988

No. 13283

BARBARA FERNANDEZ

—vs.—

ANTONIO DEINDE FERNANDEZ

[331] PETERS, C.J. This appeal involves the applicability of the doctrine of diplomatic immunity to an action for marital dissolution and equitable property distribution. The plaintiff, Barbara Fernandez, brought this dissolution action against her husband, the defendant Antonio Deinde Fernandez. Claiming diplomatic immunity by virtue of his status as an ambassador to the United Nations for the People's Republic of Mozambique, the defendant moved to dismiss the entire action for lack of personal jurisdiction.[1] The trial court denied the motion. We granted review pursuant to General Statutes § 52-265a[2] and we now uphold the judgment of the trial court and remand for further proceedings.

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1 The sole basis for the alleged lack of personal jurisdiction in this case is diplomatic immunity. The defendant raises no claim that he lacks minimum contacts with the forum state; *International Shoe Co. v. Washington*, 326 U.S. 310, 319-20, 66 S. Ct. 154, 90 L. Ed. 95 (1945); or that the plaintiff failed to comply with applicable statutory service of process rules. General Statutes §§ 46b-44, 46b-45 and 46b-46.

2 "[General Statutes] Sec. 52-265a. DIRECT APPEAL ON QUESTIONS INVOLVING THE PUBLIC INTEREST. (a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the superior court in an action which involves a matter of substantial public interest and in which delay may work

The complaint in this case invokes the equitable powers of the Superior Court for a variety of purposes. [332] Principally, the plaintiff seeks a dissolution of her marriage to the defendant on the ground of irretrievable breakdown. Incident to the dissolution, the plaintiff requests an assignment "of all of defendant's right, title and interest in certain real property located at 27 Oaley Lane, Greenwich, Connecticut." In addition, the plaintiff seeks a portion of the defendant's estate, support payments and attorneys' fees.

As this expedited appeal comes to us from the denial of a motion to dismiss, very little is known at this juncture about the parties to this suit. The complaint states that the plaintiff and defendant were married at Arlington, Virginia, on May 1, 1961. The parties allegedly separated in late 1984 or early 1985 when the defendant voluntarily left the marital home. A short time thereafter, but before the filing of the instant action, the defendant became Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique.

At the hearing on the motion to dismiss, the plaintiff testified to the following alleged facts: The parties' three children were born in the United States and are above the age of majority. In 1974, the plaintiff and the defendant purchased real property at 27 Oakley Lane in Greenwich in the name of a Connecticut cor-

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a substantial injustice, may appeal under this section from the order or decision to the supreme court within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

"(b) The chief justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice.

"(c) Upon certification by the chief justice that a substantial public interest is involved and that delay may work a substantial injustice, the trial judge shall immediately transmit a certificate of his decision, together with a proper finding of fact, to the chief justice, who shall thereupon call a special session of the supreme court for the purpose of an immediate hearing upon the appeal.

"(d) The chief justice may make orders to expedite such appeals, including orders specifying the manner in which the record on appeal may be prepared."

poration, Santa Barbara Estates U.S.A., Inc. According to the plaintiff, she was the corporation's president and principal shareholder at the time of this purchase. Although the defendant traveled extensively from 1974 onward, he and the plaintiff occupied the Greenwich residence as husband and wife until his departure in late 1984 or early 1985.[3]

[333] In tandem with the filing of her complaint, the plaintiff applied for an ex parte prejudgment remedy against the defendant. In a sworn affidavit accompanying her application, the plaintiff stated that the defendant is "an international businessman and diplomat" who "has admitted to being one of the richest men in Africa. He heads dozens of companies, and I believe his net worth exceeds $75 million." She further stated that, in her opinion, the defendant could easily sell or transfer assets that are relevant to her claims for relief. Of particular concern to the plaintiff was the Greenwich home where she resides with her youngest son. "This home is owned by Santa Barbara Estates U.S.A., Inc. This entity is controlled by my husband. I am afraid that my husband will use his influence to defeat my interest in the home." The trial court, *Novack, J.*, granted the application, ordering, inter alia, that the plaintiff may attach, to the value of $8,000,000, the defendant's shares in Santa Barabara Estates U.S.A., Inc.

The trial court subsequently denied the defendant's motion to dismiss the action. Although the court found that the defendant is a bona fide diplomat entitled to whatever protection international law affords, it rejected the defendant's claim of diplomatic immunity for two reasons. The court first held that the Superior Court has plenary jurisdiction over the defendant and his assets because the instant action is a "family relations"

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3 Neither the citizenship nor the current residence of the defendant is clear on the record. The plaintiff "believes" that her husband is a Nigerian citizen. As to residence, a quitclaim deed transferring the Greenwich home from corporate ownership to the defendant individually lists his abode as of October 23, 1986, as Chateau de Bois Pouillette, 284 Chemin de Crepy, Pont Pois 60700, Pont Ste. Maxence, France. Alternatively, the plaintiff's application for order of notice cites the following potential residences: (1) 11310 Lilting Lane, Singing Woods, Fairfax Station, Fairfax, Virginia; (2) Concorde de Crillon Hotel, 10 Place De La Concorde, Paris, France; or (3) 8 Rue Nueve DuMoland, Geneva, Switzerland.

matter and not a "civil" action. Only the filing of a "civil"[4] action against diplomats is barred by the [334] Vienna Convention on Diplomatic Relations.[5] Alternatively, the court held that it at least had the authority to dissolve the marriage because of its in rem jurisdiction over the marital status of the parties. Even if the instant action is "civil" and the Convention applies, the court held that Connecticut law gave it the power to enter a valid dissolution order without having personal jurisdiction over the defendant. *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 545, 295 A.2d 519 (1972). This latter holding dealt only with marital status; the court did not address the question of its authority to grant the plaintiff's claims for property distribution incident to dissolution.

After the filing of this appeal, the People's Republic of Mozambique executed a limited waiver, as is its prerogative

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4 Article 31 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No 7502, 500 U.N.T.S. 95 (done at Vienna April 18, 1961, entered into force for the United States December 13, 1972), provides: "1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State . . . ."

5 The defendant enjoys diplomatic immunity in accordance with the agreement between the United States and the United Nations, Agreement Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. 1676, 11 U.N.T.S. 11. Section 15 of the Headquarters Agreement provides in relevant part that "[e]very person designated by a Member . . . as a resident representative with the rank of ambassador . . . shall . . . be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords diplomatic envoys accredited to it." While not affording protection of its own, the Headquarters Agreement incorporates the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. In accordance with the Diplomatic Relations Act, any action barred by the immunity provisions of the Vienna Convention "shall be dismissed." 22 U.S.C. § 254d (1982). Throughout this opinion, we refer to the Headquarters Agreement, the Vienna Convention and the Diplomatic Relations Act as simply the "Convention" or the "treaty."

under Article 32[6] of the Convention, permitting the Superior Court "to enter an order dissolving [335] the marital status only" between the plaintiff and the defendant.[7] Accordingly, a remand to the trial court for an adjudication of the marital status question will be necessary regardless of the outcome of this

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6 Article 32 of the Convention provides: "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. 2. Waiver must always be express. 3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim. 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary."

We note, in addition, the representation of the amicus curiae United States that the defendant's diplomatic status is currently under review by the Department of State.

7 The full text of the waiver provides: "LIMITED WAIVER OF IMMUNITY "Pursuant to Article 32 of the Vienna Convention on Diplomatic Relations, the People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relatoins to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said Court, encaptioned *Fernandez* v. *Fernandez*, docket number FA-87-0085485-S. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from *in personam, in rem* or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding. The limited purpose of this waiver of diplomatic immunity is solely to permit the marital status only between the parties to be dissolved without Mrs. Fernandez having to institute an action for divorce in the People's Republic of Mozambique.

The People's Republic of Mozambique

By: _____"

appeal. The only question before us is whether, on remand, the [336] trial court will have any authority to award the real and personal property the plaintiff claims in her complaint.

The defendant urges us to answer this question in the negative for two reasons. He first maintains that the trial court erred in exempting this "family relations" action from the scope of "civil" proceedings defined by the Convention. Citing treaty history, prior judicial decisions and general principles of diplomatic immunity, he claims that the trial court's restrictive view is contrary to international law and illustrates the type of parochialism that the Convention meant to eliminate. Second, the defendant claims that the instant action does not come within the express exception to diplomatic immunity that permits the filing of a "a real action relating to private immovable property" owned by a diplomat. According to the defendant, this action is merely a divorce proceeding that could have ancillary consequences on real property; even if the in rem exception applies, the real estate at issue is exempt under a further Convention provision that immunizes the "private residence" of a diplomat. We agree with the first but not with the second of these claims.

I

We agree with the defendant that the instant action is "civil" for purposes of establishing immunity under the Convention. As a matter of municipal[8] law, "[a]n action for a divorce or a legal separation obviously is a civil action." *Smith* v. *Smith*, 150 Conn. 15, 19, 183 A.2d 848 (1962). General Statutes § 46b-45 leaves no doubt that "[a] proceeding . . . for . . . dissolution of marriage . . . shall be commenced by the service and filing of a complaint as in all other civil actions in the superior court . . . ." The plaintiff's reliance on [337] *Chieppo* v. *Robert E. McMichael, Inc.*, 169 Conn. 646, 363 A.2d 1085 (1975), is unavailing. In *Chieppo*, we held that an appeal to the

8 In the context of international law, the term "municipal" refers to a nation or state, not the narrower entity of a city or town. Black's Law Dictionary (Rev. 4th Ed. 1968) p. 1169.

Superior Court from a workers' compensation proceeding is not a "civil action" within the meaning of the transfer statute then in effect. A key basis for this conclusion was that the legislature had created a special regime for the informal and expeditious resolution of compensation claims. *Id.*, 651-54. There is no similar comprehensive administrative scheme relating to domestic relations. Contrary to the plaintiff's suggestion and the trial court's conclusion, the mere existence of separate Practice Book provisions pertaining to family matters does not rebut the strong inference, flowing from § 46b-45 as well as from *Smith* v. *Smith*, supra, that divorce proceedings are "civil" actions under Connecticut law.

Even if municipal law were equivocal on this question, controlling principles of international law dictate that the instant claim is a "civil" action. Article 31 of the Vienna Convention provides that a "diplomatic agent shall enjoy immunity from the . . . civil and administrative jurisdiction" of the receiving state. The negotiating history of the Convention supports a broad reading of this language. Sir Gerald Fitzmaurice, the special rapporteur who drafted the Convention under the auspices of the International Law Commission, explained that he "could not imagine a proceeding which would not fall under one of the three jurisdictions—criminal, civil and administrative." 1 Y.B. Int'l L. Comm'n 147 (1958). Further, the record reveals an explicit awareness by the drafters that marital dissolution proceedings were prohibited by the Convention. One drafter noted that "[t]he immunity of the diplomatic agent was maintained even in the . . . matter of divorce, because a divorce action under the local **[338]** jurisdiction was incompatible with his dignity as a diplomat." 1 Y.B. Int'l L. Comm'n. 97 (1957).

We therefore conclude that the trial court's assertion of jurisdiction under the aegis of "family relations" was erroneous. See also *Shaw* v. *Shaw*, 3 All E.R. 1, 3, 3 W.L.R. 24 (1979) (construing Article 31 to bar divorce proceedings against an accredited diplomat). Our conclusion is consistent with case law in effect in this country prior to the entry into force of the Convention in 1972. In *Carrera* v. *Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949), and *Tsiang* v. *Tsiang*, 194 Misc. 259, 260, 86 N.Y.S.2d 556 (1949), the courts dismissed actions for marital

separation on grounds of diplomatic immunity. Article 31 and its negotiating history therefore affirm the general principle that the Vienna Convention was meant to codify existing rules of customary international law. E. Denza, Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations (1976) p. 1. Prior decisions such as *Carrera* and *Tsiang* are strong evidence of the intent of the drafters of the Convention and the consequent meaning of Article 31 itself. Accordingly, the trial court erred in finding that this was not a "civil" matter and that it had plenary power to adjudicate all facets of this case.

II

Article 31 of the Convention immunizes a diplomatic agent from the civil jurisdiction of the receiving state "except in the case of: (1) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending State for the purpose of the mission." The question that we must resolve is whether the plaintiff's claim to the title of the Greenwich home and real estate is cognizable under this exception to the rule of diplomatic immunity.

[339] It is true, as the defendant emphasizes, that the plaintiff's claim arises in the context of a marital dissolution action. It is also true, as we noted earlier in this opinion, that such actions are normally barred by a diplomat's immunity from the "civil" process of the receiving state. It is not necessarily true, however, that the generalized immunity conferred by the treaty prevails over the specific language of the in rem exception. To the contrary, we believe the in rem exception, as a particularized recognition of the receiving state's special interest in its land, reflects an intent to limit the generalized protection of Article 31 of the Convention. Whether such a result is mandated in the circumstances of this case depends on the precise meaning of the phrase "real action relating to private immovable property." Since the plaintiff has raised a bona fide question regarding the applicability of the in rem exception, we must

interpret the Convention as a whole to determine whether her claim is meritorious.

Before turning to the ultimate issue, however, we are mindful that, but for diplomatic immunity, the plaintiff's claim for real property incident to marital dissolution would readily be entertained by our courts. Domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975); *Carabetta* v. *Carabetta*, 182 Conn. 344, 346, 438 A.2d 109 (1980). This plenary state power encompasses not only the regulation of marital status, but also the distribution of property and protection of offspring. *Williams* v. *North Carolina*, 317 U.S. 287, 298-99, 63 S. Ct. 207, 87 L. Ed. 279 (1942). Federal courts decline to excercise jurisdiction over petitions for divorce or alimony, even where diversity of citizenship exists, out of respect for this zone of state authority. *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84, 50 S. Ct. 154, 74 L. Ed. 489 (1930); [340] *Barber* v. *Barber*, 62 U.S. (21 How.) 582, 16 L. Ed. 226 (1859). The plaintiff's claim for title to Connecticut real estate also invokes this state's "strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property . . . ." *Shaffer* v. *Heitner*, 433 U.S. 186, 208, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

It is nevertheless a basic tenet of treaty law that binding agreements are to be respected and enforced ("pacta sunt servanda"). M. Janis, An Introduction to International Law (1987) pp. 8-11. In particular, the state interest in furnishing a judicial forum in this case is subject to the supremacy of a binding treaty commitment of the United States government. U.S. Const., art. VI, § 2; *United States* v. *Belmont*, 301 U.S. 324, 331, 57 S. Ct. 758, 81 L. Ed. 1134 (1937); *Missouri* v. *Holland*, 252 U.S. 416, 434, 40 S. Ct. 382, 64 L. Ed. 641 (1920). In giving priority to a binding treaty, we must interpret the treaty in good faith in accordance with the ordinary meaning of its terms and in the light of its object and purpose. 1 Restatement (Third), The Foreign Relations Law of the United States (1987) § 325. "Interpretation . . . must, of course, begin with the language of the Treaty itself. The clear import of the treaty language con-

trols unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982).

Article 31 clearly sets forth an exception to diplomatic immunity for any "real action relating to private immovable property." The concept of excluding actions relating to real property from the scope of diplomatic immunity was firmly entrenched prior to the adoption of the Convention. See generally 2 Y.B. Int'l. L.

[341] Comm'n 78, 98 (1958); E. Denza, supra, pp. 154-56; C. Wilson, Diplomatic Privileges and Immunities (1967) p. 107; B. Sen, A Diplomat's Handbook of International Law and Practice (2d Ed. Rev. 1979) p. 111; *Anonymous* v. *Anonymous*, 44 Misc. 2d 14, 19, 252 N.Y.S. 2d 913 (1964). In a position paper prepared in 1961 for the United States delegation to the negotiating conference for the Convention, the Department of State recognized the historic validity of the real property exception: "It is axiomatic that real property other than that owned by the sending State and used for diplomatic purposes, is within the exclusive jurisdiction of the state in which it is located. Moreover, since actions respecting real propety are usually *in rem*, it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the proper performance of his diplomatic functions." 7 M. Whiteman, Digest of International Law (1970) p. 407.

Turning to the specific meaning of the treaty in this case, we face a question of first impression concerning the intended scope of the language of the exception. The parties submit divergent interpretations. According to the plaintiff, her claim for ownership of the Greenwich home, even though it arises in the context of a dissolution proceeding, falls within the plain meaning of the exception. The defendant, on the other hand, argues that the plaintiff's position, if adopted, would eviscerate the treaty. He maintains that a litigant could evade the broad immunity of the treaty by attaching the real property of a diplomat in order to satisfy an unrelated *in personam* judgment.

Such a maneuver would, according to the defendant, enable a litigant to "alchemize" a run-of-the-mill tort dispute into one "relating to private immovable property" within the meaning of the treaty, thereby defeating the intent of the signatories.

[342] We are persuaded by the plaintiff that the treaty allows her claim for ownership of the family residence to be heard in this case, in which the sending state has waived any claim of immunity with regard to the dissolution of the marriage.[9] We rely on two principal grounds for our conclusion. First, the language of the exception eschews any technical focus on the *form* of action brought and instead raises the sole question of whether the real property is *itself* the disputed object of the litigation. Despite the absence of published cases construing the provision or any discussion by the drafters of the meaning of "real action," we are not entirely without interpretive guidance. A leading commentator has defined the exception thus: "The essence of the term 'real action' is that the relief sought is either a declaration of title to the property, an order for sale by authority of the court, or an order for possession. The term is used in the sense of an action in rem . . . ." E. Denza, supra, pp. 159-60. An identical conclusion was reached by a second commentator. "[A] real action is an action where ownership or possession of immovable property is claimed." E. Satow, Guide to Diplomatic Practice (5th Ed. 1979) § 15.13, p. 125.

The express terms of the treaty, as construed, thus support a conclusion that the Superior Court has jurisdiction over the defendant for the purpose of adjudicating the plaintiff's claim of ownership of the Greenwich home. The very object and purpose of the plaintiff's complaint is a vindication of her claimed right of ownership of the real estate. The substance of her claim is that she is entitled to the home as an immediate and **[343]** essential consequence of her marital dissolution.

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9 We need not decide whether Connecticut would in any case have jurisdiction to dissolve a Connecticut marriage that, in its entirety, antedated the assumption of ambassadorial status. Furthermore, we need not decide whether the trial court's in rem jurisdiction, which is ancillary to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn.

This is simply not a case where the plaintiff seeks to satisfy a collateral judgment in her favor by forcing the sale or transfer of unrelated real property. Under the latter circumstances, the defendant's concern for the evisceration of the treaty might be well-founded. When the complaint alleges a direct right of ownership of the thing itself, however, such a concern finds no basis in law or fact.

Second, the overriding emphasis of the Convention is functional. The preamble states the general principle that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of the diplomatic missions." The functional approach of the Convention is a departure from the two classical theories of diplomatic immunity. One theory posited that the diplomat was the personification of the sending state and therefore entitled to the highest dignity. Another theory rested on the legal fiction that the diplomat was always on the soil of the sending state, wherever he or she might actually go, and therefore was extraterritorially immune from process. See generally B. Sen, supra, pp. 80-81; C. Wilson, supra, pp. 1-16. Both theories contained an inflexible presumption of immunity for protected diplomats.

The Vienna Convention, on the other hand, adopted a theory that justifies immunity by the need to safeguard the actual functioning of the diplomatic mission. C. Wilson, supra, pp. 17-25. "The functional approach is not merely an academic rationale. During the formulation of the Vienna Convention it guided the makers at every crucial point. The general result was to tighten the protection given to the mission itself—its premises, its communications, its property, its archives and the inviolability of its senior members." E. Denza, supra, p. 5. Although we do not view the functional approach **[344]** as an open invitation to disregard the doctrine of diplomatic immunity, the Convention itself imposes limitations on the scope of immunity in order to minimize abuse.

This functional theory had a specific ramification in the drafting of the in rem exception. "[A] real attempt has been made to strike a balance between the need to protect a diplomat in regard to official matters and to guard him from the harassment of frivolous lawsuits and the conflicting need to minimise

abuse of immunity by diplomats in regard to matters which have nothing to do with their job and to provide a forum for those cases involving land where a plaintiff might otherwise have no other." E. Denza, supra, p. 4. The drafters' sense of balance is reflected by the narrow scope of the in rem exception. It does not expose to municipal jurisdiction any real property held by the diplomat "on behalf of the sending State for purposes of the mission"; Vienna Convention, Article 31(a); or the "private residence of a diplomatic agent." Id., Article 30 (1). The exception thus represents a studied effort by the drafters to balance the competing factors of national sovereignty over land and diplomatic inviolability.

On remand, then, it is for the trial court to determine whether to grant the plaintiff title to the disputed real property. The defendant argues that his interest in the family home is immune from jurisdiction as the "private residence of a diplomatic agent" pursuant to Article 30 of the Convention.[10] On the record before us, we are unable to resolve this claim. The trial court made no findings of fact on the question of whether the defendant continues to maintain his "private residence" **[345]** at the Greenwich home. It is possible that the defendant vacated the home not intending to return and therefore no longer resides there. See, e.g., *Agbor* v. *Metropolitan Police Commissioner*, 2 All E.R. 707, 1 W.L.R. 703 (1969). We, of course, express no view on the merits of this factual question.[11]

III

The final question is whether, on remand, the trial court will have authority to award the plaintiff support payments and whatever ancillary monetary relief seems appropriate. In sup-

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10 Article 30 of the Convention provides: "1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission. 2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability."

11 The dissent suggests a ground for jurisdiction that was not argued by either party in this court. In our view, we lack either a factual or legal basis for exploring it in this case.

port of jurisdiction over her claims, the plaintiff relies not on a specific treaty provision, as was the case regarding real property, but instead on her alleged due process right of access to a judicial forum for a resolution of all disputes arising out of a marital dissolution. She maintains that the residual immunity conferred upon the defendant in this case must give way to her right of access guaranteed by the fourteenth amendment to the United States constitution. See *Boddie* v. *Connecticut*, 401 U.S. 371, 377-79, 91 S. Ct. 780, 28 L. Ed. 113 (1971).[12]

This claim raises serious concerns about the interrelationship of two equally valid federal laws: constitutional principles safeguarding individual rights and treaty provisions preserving the inviolability of diplomatic agents. As a general rule, a treaty provision that contravenes "any of the prohibitions or limitations of **[346]** the Constitution applicable to the exercise of authority by the United States" is null and void. 1 Restatement (Third), The Foreign Relations Law of the United States (1987) § 302(2). The United States Supreme Court has "regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957). The reason for this rule is that the federal government, as a creature of the constitution, must exercise its authority within the limitations proscribed by its charter. Id., 16-17.

Presumably, the right enunciated in *Boddie*, which springs from the due process clause of the fourteenth amendment, applies against the federal government through the due process clause of the fifth amendment. *Boddie* thus constitutes, in the language of the Restatement, a limitation "applicable to the exercise of authority by the United States." We nevertheless face a troubling uncertainty as to the scope of *Boddie*: Does the right of access to dissolve a marriage include the right of access to obtain proprietary relief incident to divorce? We think not.

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12 Because of the limited waiver in this case, we do not consider the further claim that *Boddie* gives the plaintiff a constitutional right of access to obtain a divorce that would take priority over the general immunity of the Convention. If the sending state were to withdraw its waiver or our interpretation of the real property exception were deemed erroneous, this difficult question would have to be addressed.

The focus of the Supreme Court in *Boddie* was squarely on the "fundamental human relationship" of marriage. *Boddie* v. *Connecticut*, supra, 383. "The denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." *United States* v. *Kras*, 409 U.S. 434, 444, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). The plaintiff offers no direct authority to the contrary and we have found none. We therefore decline to expand the holding of *Boddie* beyond its factual boundaries of the marital status. Accordingly, no conflict exists between the federal constitution and the Vienna Convention in this case.

There is no error. The case is remanded to the trial court for further proceedings in accordance with this opinion.

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[347] In this opinion CALLAHAN, GLASS, COVELLO and HULL, Js., concurred.

SHEA, J., with whom HEALEY, J., joins, dissenting in part. I agree with the majority that the trial court had jurisdiction to adjudicate and protect the present interest of the plaintiff in the Greenwich residence, assuming that the property does not qualify as the "private residence of a diplomatic agent," a factual issue yet to be determined in the trial court. I disagree, however, with the implications of the majority opinion that the court upon remand would have jurisdiction to transfer to the plaintiff all or part of the defendant's interest in the residence simply because her claim of a present interest in that real estate is joined with her claim for a dissolution of her marriage. I also would find error in the failure of the trial court to dismiss all of the plaintiff's claims for relief that specifically invoke the authority of the court under our marital dissolution statutes to assign property and to grant other relief as adjuncts to a marital dissolution.

I

The majority opinion appears to concede[13] that the plaintiff's action for dissolution of her marriage, at the time the trial court denied the defendant's motion to dismiss, was barred by the Vienna Convention on Diplomatic Relations, because "the record reveals an explicit [348] awareness by the drafters that marital dissolution proceedings were prohibited by the Convention." The fact that, after the appeal was filed, a limited waiver of the defendant's diplomatic immunity was executed to permit only dissolution of the marital status of the parties renders that determination of the trial court moot. Because the waiver is effective only for the purpose of dissolving the marriage, however, it cannot serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage under our statutes.

The prayer for relief of the complaint in this action seeks, in addition to a dissolution of the marriage, the following remedies: (1) "[a]n assignment of a portion of the defendant's estate in accordance with [General Statutes] § 46b-81"; (2) "[a]n assignment to the plaintiff of all of defendant's right, title and interest in certain real property located at 27 Oakley Lane, Greenwich, Connecticut, pursuant to [General Statutes] § 46b-81"; (3) "[r]easonable support pursuant to [General Statutes] § 46b-82"; (4) "[r]easonable attorney's fees in accordance with [General Statutes] § 46b-62"; and (5) "[s]uch other, further, and different relief as the court may deem proper." This cornucopia of demands appears to have been overlooked by the majority in declaring that "[t]he very object and purpose of the

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13 In Part III of the majority opinion the claim of the plaintiff that she has a right of access to the courts under the fourteenth amendment to the United States constitution for the purpose of dissolving her marriage, relying upon *Boddie* v. *Connecticut*, 401 U.S. 371, 377-79, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971), is rejected insofar as the plaintiff asserts that right as a basis for the additional relief she seeks as an adjunct to the dissolution. Because the waiver of diplomatic immunity in respect to the dissolution itself makes it unnecessary to decide whether *Boddie* has created a constitutional right to a dissolution of marriage, absent the element of discrimination against the poor that was present in that case, the majority opinion has left the constitutional question unresolved.

plaintiff's complaint is a vindication of her claimed right of ownership of the real estate."

As I understand the majority opinion, however, it concludes that the only relief a court of this state has jurisdiction to grant, in view of the assertion of the defendant's immunity even as modified by the waiver, is that which would be appropriate under the exception in the Convention for "a real action relating to private immovable property." Since the only immovable property of the defendant in this state disclosed by the record is the residence in Greenwich occupied by both parties until the defendant's departure, the jurisdiction of the trial court under the "real action" exception would necessarily be limited to adjudicating the present interests of the parties in that real estate. Accordingly, as the majority opinion holds, the plaintiff's claims with respect to any other property of the defendant or for such monetary relief as alimony under General Statutes § 46b-82 or attorney's fees under General Statutes § 46b-62, cannot be pursued in this state. Thus, even under the majority view, the prayers seeking such relief should be dismissed because the court has no jurisdiction over the defendant to grant such relief.

The majority opinion, referring to the Greenwich residence, declares that "[t]he substance of [the plaintiff's] claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution." Because the restricted waiver of the defendant's immunity permits only the dissolution of the marriage, however, I believe the power of the court under the "real action" exception to determine the interests of the parties in the residence cannot be deemed to include the authority given under General Statutes § 46b-81 to a court when dissolving a marriage to "assign to either the husband or the wife all or any part of the estate of the other," which the plaintiff has expressly invoked in her prayer for relief, as the quotation from the majority opinion implies. The authority to transfer property of one spouse to another under § 46b-81 is plainly limited to actions for dissolution or annulment of marriage or for legal separation. The court, "[i]n fixing the nature and value of the property, if any, to be assigned," is directed to consider "the length of the marriage, the causes for the . . .

dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." If the court were **[350]** to exercise the authority to assign the defendant's interest in the residence to the plaintiff pursuant to § 46b-81, as she seeks, the concern of the Convention that the immunity of a diplomat be preserved in a divorce action because such a proceeding "under the local jurisdiction was incompatible with his dignity as a diplomat" would be wholly frustrated. 1 Y.B. Int'l L. Comm'n 97 (1957).

As her claim is summarized in the majority opinion, the plaintiff maintains "that she is entitled to the home as an immediate and essential consequence of her marital dissolution." She would, however, be barred by the Convention and the limited terms of the defendant's waiver from enhancing whatever interest in the residence she may presently possess by relying upon the circumstance that the adjudication of the interests of the parties may be made in the context of a marital dissolution proceeding. In my view, therefore, the plaintiff's claim for the relief of "an assignment of all of the defendant's interest in [the residence] pursuant to Conn. Gen. Stat. § 46b-8]" should be dismissed as beyond the jurisdiction of the court when diplomatic immunity has been raised, together with her other claims for relief that are unrelated to the residence, which the majority opinion concedes are not viable in this state.

II

The complaint in this action contained, in addition to standard allegations relating to the dissolution of the marriage, the following paragraph: "The parties are the equitable and beneficial owners of real property located at 27 Oakley Lane in Greenwich, Connecticut." The prayer for relief, which contains separate claims for specific statutory remedies as adjuncts to the dissolution, also includes a claim for general equitable relief.

An affidavit of the plaintiff filed in support of her application for a prejudgment remedy asserts that the **[351]** Greenwich residence is owned by a Connecticut Corporation, Santa Barbara Estates U.S.A., Inc. At the hearings on the defendant's motion to dismiss, the plaintiff testified that in 1974, when the home was purchased, she was the majority shareholder of the corporation. She also testified that in 1986, without her knowledge and consent, the defendant had managed to have title to the residence transferred to his name. This testimony lends some substance to the allegation of the complaint that the plaintiff has an equitable interest in this real estate for which the complaint may be construed to seek an adjudication under the general equitable powers of the court, quite apart from the remaining allegations and prayers for relief that relate wholly to the dissolution action. The complaint, therefore, may be viewed to include a claim for a "declaration of title to the property" with attendant equitable relief that undoubtedly would qualify under the Convention as "a real action relating to private immovable property." E. Denza, Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations (1976) pp. 159-60. Although the assertion of this claim as an independent ground upon which to proceed against the defendant would have been more readily apparent had it not been intermingled with the claims that are related solely to the dissolution, the jurisdiction of the court does not depend on the niceties of pleading. "It is the fact of jurisdiction, not the way in which it is made to appear, which is the vital thing." *Artman* v. *Artman*, 111 Conn. 124, 126, 149 A. 246 (1930). The record adequately discloses that the plaintiff does claim to have an interest in real estate adverse to that of the defendant which she seeks to have determined and to protect.[14] That claim plainly falls within the "real action" exception of the Convention.

[352] I conclude therefore, that the trial court erred in failing to dismiss for lack of jurisdiction all of the plaintiff's claims that expressly invoke the authority of the court under our mari-

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14 The majority opinion in footnote 11 maintains that this ground for jurisdiction was not raised on appeal. The plaintiff's brief, however, concludes [missing copy]

tal dissolution statutes to grant relief beyond the dissolution of the marriage itself, a remedy to which the defendant's waiver expressly assents. I agree with the majority that the trial court acquired jurisdiction under the complaint to determine the interest of the plaintiff in the Greenwich residence, unless that residence constitutes the "private residence of a diplomatic agent" under the Convention, a question to be resolved upon the remand. I disagree, however, with the implicit view of the majority opinion that the interest she presently possesses may somehow be enhanced as a result of the marital dissolution or that the court may assign all or part of the defendant's interest in the residence to her pursuant to § 46b-81.

Accordingly, I dissent in part.

Decision of the Superior Court of Connecticut

SUPERIOR COURT

JUDICIAL DISTRICT OF STAMFORD/NORWALK
AT STAMFORD

October 13, 1987

NO. FA-87 0085485 S

BARBARA FERNANDEZ

—VS.—

OLADEINDE FERNANDEZ

MEMORANDUM OF DECISION

RE: DEFENDANT'S MOTION TO DISMISS (#103)

The plaintiff commenced this dissolution of marriage action on or about January 7, 1987. The defendant claims to be the Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique. As such, he asserts diplomatic immunity under the applicable international conventions and the laws of the United States. Therefore, the defendant has moved to dismiss the plaintiff's complaint based on lack of personal jurisdiction.

The parties have presented evidence and submitted excellent briefs on the issues raised by this motion. The court compliments all counsel for their efforts.

Although the issue of the defendant's status was contested, the court finds that the defendant has sustained his burden of proof. The defendant is found to be the Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique. Enjoying this status, the defendant is entitled to diplomatic immunity from all civil and

administrative proceedings. The source of this immunity is the Vienna Convention on Diplomatic Relations of April 18, 1961 which applies to the defendant under the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, Headquarters Act, CH. 482, 61 Stat. 762, Art.V section 15 (1947). The immunity afforded the defendant is set forth at 22 U.S.C. Section 254a *et seq.*, and the Vienna Convention is adopted as setting the standards for diplomatic immunity.

Although the court finds that the defendant enjoys diplomatic immunity from civil actions, the question remains whether under the law of this state, the instant action for dissolution of marriage is a civil action. If not, then the defendant would enjoy no immunity because of his status.

The court finds merit in the plaintiff's claim that the current action is not a civil action. Pursuant to Connecticut General Statutes section 46b-1 it is a "family relations matter". It is pending on the family relations docket and has not been transferred, pursuant to section 46b-2, to the criminal or civil docket.

The Connecticut Supreme Court has recognized that not all non-criminal actions pending before the superior court are "civil actions". It has noted that probate appeals, workmen's compensation matters and actions to enforce arbitration are not "civil actions". *Chieppo v. Robert E. McMichael*, 169 Conn. 646 (1975). The reasoning behind such cases is that, despite the broad definition of civil action in Connecticut General Statutes Section 52-91, the General Assembly has set forth procedures outside of Title 52 for certain actions. *See Chieppo, supra.*

This is a family relations action brought under Title 46b. Title 46b and the applicable Practice Book sections set forth separate rules that are applicable to family matters only. Thus, it appears that the Connecticut General Statutes themselves indicate that family matters in Connecticut are not civil actions. Therefore, the court concludes that the defendant's diplomatic immunity does not extend to this dissolution action.

Even if the court were to find that the present action is a civil action and that the defendant has diplomatic immunity, the defendant's motion must still fail. The court has jurisdiction

over the marriage res and can dissolve the marriage of the parties without any appearance by the defendant. Connecticut General Statutes section 46b-42 provides that the superior court shall have exclusive jurisdiction of all complaints seeking a decree of annulment, dissolution of marriage or legal separation. Connecticut courts have interpreted this statute to mean that a dissolution of marriage proceeding is an action *in rem* and not an action *in personam* which requires the appearance of or jurisdiction over the defendant. *Litvaitis v. Litvaitis*, 162 Conn. 540, 545 (1972); *Vogel v. Silvester*, 148 Conn. 666, 670 (1961); *Murphy v. Murphy*, 34 Conn. Supp. 251, 253 (1978). The Connecticut Supreme Court has held that the state has a sufficient nexus with the marriage to justify jurisdiction if one of the parties to the marriage meets the statutory jurisdictional requirements. *LaBow v. LaBow*, 171 Conn. 433, 437 (1976).

In this action, the plaintiff is an American citizen and a long time resident of Connecticut. She is entitled to the privileges and protections afforded by Connecticut law, including the right to obtain a dissolution of her marriage, even if the court lacked personal jurisdiction over the defendant.

The defendant's motion to Dismiss is denied.

/s/ NOVACK, J.
Novack, *Judge*

Decision entered in accordance with the foregoing Oct. 13, 1987

[Illegible], Asst Clerk

All counsel notified 10-13-87

No. 88-1042 (2)

Supreme Court, U.S.
FILED
MAR 17 1989
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In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ANTONIO DEINDE FERNANDEZ,
Petitioner,

v.

BARBARA J. FERNANDEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Connecticut Supreme Court correctly hold that where there was a waiver of diplomatic immunity to dissolve a diplomat's marital status, the state trial court could also assume jurisdiction over real property located in that state pursuant to Connecticut General Statutes § 46b-81, Connecticut's equitable distribution law, and Article 31 1(a) of the Vienna Convention on Diplomatic Relations which provides an exception to diplomatic immunity for "real actions relating to private immovable property . . ."?

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In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ANTONIO DEINDE FERNANDEZ,
Petitioner,

v.

BARBARA J. FERNANDEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Barbara J. Fernandez, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Connecticut Supreme Court in this case.

STATEMENT OF THE CASE

Barbara J. Fernandez is an American citizen and a long-time resident of the State of Connecticut. Antonio Deinde Fernandez is a citizen of Nigeria and an international businessman who admits to being one of the richest men in Africa. He

heads dozens of companies, and Mrs. Fernandez believes his net worth exceeds $75,000,000 (Pet. App. 4a).

Mr. and Mrs. Fernandez were married in the United States on May 1, 1961. They have three children, all of whom were born in the United States and are above the age of majority (Pet. App. 3a). In 1974, Mr. and Mrs. Fernandez purchased a home at 27 Oakley Lane in Greenwich, Connecticut. The property was held in the name of a Connecticut corporation, Santa Barbara Estates USA, Inc. Mrs. Fernandez was the corporation's president and principal shareholder at the time of the purchase (Pet. App. 4a). The parties occupied this home as husband and wife until Mr. Fernandez voluntarily left the marital home in late 1984 or early 1985 (Pet. App. 3a). The home was used exclusively as the family residence, and Mrs. Fernandez still resides at the home. Some time after Mr. Fernandez left the marital home, he acquired his claimed diplomatic status as Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique — this, despite the fact that he is apparently a Nigerian national (Pet. App. 3a).

In late 1986, without Mrs. Fernandez's knowledge or consent, Mr. Fernandez caused title to the family home to be transferred from Santa Barbara Estates USA, Inc. to his name individually (Pet. App. 4a, 20a). Shortly thereafter, by complaint dated January 8, 1987, Mrs. Fernandez brought this divorce action. She simultaneously placed an attachment on the 27 Oakley Lane property in order to secure her rights in that property and prevent its further alienation (Pet. App. 4a). In her complaint, Mrs. Fernandez requested, among other things, an assignment of all Mr. Fernandez's right, title and interest in the home located at 27 Oakley Lane (Pet. App. 3a).

Mr. Fernandez moved to dismiss the action, claiming diplomatic immunity by virtue of his asserted — though contested — status as Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique. In support of his motion, Mr. Fernandez cited the Vienna

Convention on Diplomatic Relations, *opened for signature*, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (the "Vienna Convention"), claiming that it was applicable to him through the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (the "Headquarters Agreement") and the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a–e.

On September 14, 1987, and October 6, 1987, the trial court conducted hearings on Mr. Fernandez's motion. Although Mr. Fernandez had notice of these hearings, neither he nor a representative from the Mozambique Mission appeared to testify. By ruling dated October 13, 1987, the trial court denied the motion to dismiss. Two weeks later, on the last possible day, Mr. Fernandez sought, and was thereafter granted, certification to appeal the trial court's ruling to the Connecticut Supreme Court, pursuant to Connecticut's special interlocutory appeal statute, Connecticut General Statutes § 52-265a.

After Mr. Fernandez filed his appeal with the Connecticut Supreme Court, the People's Republic of Mozambique executed a waiver permitting the trial court "to enter an order dissolving the marital status" between the parties (Pet. App. 6a). Despite this waiver and the real property exception to immunity contained in the Vienna Convention, Mr. Fernandez persisted in his argument that his claimed status as a diplomatic agent prevented the Connecticut trial court from adjudicating the parties' respective interests in the marital home.

Not surprisingly, the Connecticut Supreme Court disagreed and held that the waiver and the Vienna Convention's exception to diplomatic immunity for any "real action relating to private immovable property" set forth in Article 31 permitted adjudication of Mrs. Fernandez's "claimed right of ownership of the real estate." (Pet. App. 12a). In doing so,

the court summarily rejected Mr. Fernandez's claim that the real property exception did not apply to this case because the case involved only the securing of a potential judgment through the attachment of unrelated real property. The court made clear that this case concerns "a direct right of ownership of the [property] itself" — the essence of the real property exception. (Pet. App. 13a). The court, therefore, remanded the case to the trial court for adjudication of the parties' respective interests in the marital home.

Again, on the last possible day for filing, Mr. Fernandez filed a Motion for Reargument and Clarification with the Connecticut Supreme Court. On September 20, 1988, that Motion was denied (Pet. App. 1a). Exactly ninety days later, Mr. Fernandez filed his Petition for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE UNITED STATES SUPREME COURT SHOULD NOT HEAR THIS MATTER SIMPLY BECAUSE MR. FERNANDEZ CLAIMS TO BE AN AMBASSADOR.

Mr. Fernandez asserts that because this case "affects ambassadors" it has special significance and merits review by this Court (Pet. App. 12–13). Mr. Fernandez does not cite any authority for this rather remarkable proposition. Indeed, he acknowledges that this Court no longer has exclusive jurisdiction over cases involving ambassadors, but shares jurisdiction with state courts pursuant to 28 U.S.C. § 1251(b)(1). The legislative history to the Diplomatic Relations Act, which, in 1978, codified this change, explains:

> [T]here is no justification for continuing to vest original and exclusive jurisdiction in the Supreme Court in those instances where foreign ambassadors, members of diplomatic missions, or members of their families will be subject to suit in the courts of the United States under this bill. The Supreme Court should not be burdened with such litigation on its original docket.

S Rep. No. 958, 95th Cong., 2d Sess. 6 *reprinted in* 1978 U.S. Code Cong. & Admin. News 1935, 1946. As Professor Wright has noted, "[i]t is reassuring to know that the Supreme Court is no longer required to hear all actions against ambassadors." C Wright, *The Law of Federal Courts*, 773 (4th ed. 1983).

This case is precisely the type of case Congress sought to remove from this Court's overburdened docket. Although this case facially involves an individual claiming ambassadorial status, the underlying issues concern, almost exclusively, matters of particular importance to states and private individuals — dissolution of marital status and resolution of conflicting claims to real property located within the state's territory. As such, this case does not warrant review by this Court.

II. THIS PETITION PRESENTS A CASE OF SIGNIFICANCE ONLY TO THE PARTIES.

A. The Decision Of The Connecticut Supreme Court Turns On The Particular Facts Of This Case And Will Affect Few, If Any, Other Litigants.

In deciding whether to grant certiorari, this Court should consider whether the dispositive issue is dependent on its particular facts. If so, this Court should deny certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The issue presented, no matter how "intellectually interesting and solid," must be of significance to more than simply the particular litigants and must be "beyond the academic or the episodic" before this Court will consider granting certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). In other words, the issue must not only be a significant one, but its resolution must be important to more than the particular litigant.

The facts giving rise to this lawsuit are unique and unlikely to recur. Mrs. Fernandez is an American citizen seeking a dissolution of her marriage and a distribution of her and her husband's real property. At the time Mrs. Fernandez commenced this lawsuit, she and her husband had been married for over twenty-six years, had lived in the United States for their entire married life and had raised three children, all of whom were born in the United States. Mr. Fernandez did not "acquire" his diplomatic status until after he voluntarily departed the marital home in 1984 or 1985 — a home in which Mrs. Fernandez still resides.

This case is made more unique by the fact that the People's Republic of Mozambique issued a waiver of immunity to the Connecticut courts. As such, the Connecticut Supreme Court was not only required to analyze and construe the interplay of Mr. Fernandez's claim of diplomatic immunity, Connecticut's marital laws, and the unusual facts of this case, the

court was also faced with conducting a specific fact-based inquiry into the nature and scope of the waiver of immunity — an inquiry obviously unique to the specific facts of this case.

It is extremely unlikely that any future litigants or courts will ever be faced with the unique facts of this case; the Connecticut Supreme Court's decision — and this Court's review of that decision — will therefore not be of significance to anyone other than these parties.

B. There Is No Conflict In The Lower Courts Regarding The Issues Involved In This Case.

A key factor supporting review on certiorari is a real conflict in interpretation in the lower courts concerning the issues involved in the case presented for review. Sup. Ct. R. 17.1 (1985); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). No such conflict exists here.

The issue presented in this case is whether the "real property exception" to diplomatic immunity contained in Article 31 of the Vienna Convention applies to an adjudication of the parties' interest in their marital home incident to a dissolution of their marriage. Not only did the Connecticut Supreme Court recognize that "this is a case of first impression" (Pet. App. 11a), but petitioner concedes that "[t]here are no published cases construing this exception" in any type of proceeding. (Pet. App. 14). Thus, not only is there no conflict regarding the real property exception in the dissolution context, there is no conflict of interpretation concerning the scope of the real property exception to the Vienna Convention in any context. Absent a conflict, this Court need not involve itself in this necessarily private controversy.

There is no unresolved or conflicting question of national or international importance presented by this petition. As such, this petition presents a case of significance only to the parties.

III. THE DECISION OF THE CONNECTICUT SUPREME COURT DOES NOT WARRANT REVIEW BECAUSE IT IS A CORRECT DECISION.

A. The Real Property Exception Contained In The Vienna Convention Applies To This Case.

Article 31 of the Vienna Convention sets forth an exception to diplomatic immunity for any "real action relating to private immovable property." In arriving at its decision that the real property exception applies to this case, the Connecticut Supreme Court properly analyzed the express terms of the real property exception. As such, further review of the court's decision is not necessary.

The Connecticut Supreme Court, citing to leading commentators on the Vienna Convention, recognized that "a real action is an action where ownership or possession of immovable property is claimed." The court found that the very object and purpose of the plaintiff's complaint, regardless of whether she seeks a dissolution of marriage, is a vindication of her claimed right of ownership of real estate located within the State of Connecticut (Pet. App. 12a–13a). The court thus concluded that this action fell within the real property exception.

The court found further support for its position in the negotiating history of the Vienna Convention. The court cited favorably the Department of State Instructions to the United States Delegation to the 1961 United Nations Conference in Vienna: "[S]ince actions respecting real property are usually *in rem* it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the property performance of his diplomatic functions." (Pet. App. 11a). Though petitioner misstates this language and argues that only *in rem* actions are included within the real property exception, the word "usually" indicates that other actions were indeed contemplated. These instructions are far more instructive in the interpretation of

the Vienna Convention than the discussion of Maine law in *Lewien v. Cohen*, 432 A.2d 800 (Me. 1981), the principal authority upon which petitioner relies in support of his argument that the real property exception includes only *in rem* proceedings.

The Connecticut Supreme Court also properly analyzed the philosophy underlying the entire Vienna Convention. The court recognized that the Convention's purpose is to ensure the efficient performance of the functions of the diplomatic missions, not to benefit individuals (Pet. App. 13a). The court, while acknowledging that the "functional" approach to immunity is not an open invitation to disregard the doctrine of diplomatic immunity, recognized that the Convention has established limitations on the scope of immunity — such as the real property exception — in order to minimize abuse by individuals hiding behind their claimed diplomatic shields (Pet. App. 13a–14a).

Mr. Fernandez claims that adjudication of rights and interests to the real property in question would delve into his most personal affairs and would directly challenge the prestige and dignity of his claimed status as a diplomat. In fact, these matters would affect Mr. Fernandez as an individual, not as a diplomat. This case seeks to adjudicate Mrs. Fernandez's interest in her home which she had shared with her husband for over 10 years before their separation and his acquisition of claimed diplomatic status — a home where the parties have raised their children and Mrs. Fernandez still resides. Resolution of these issues will certainly have no effect on the efficient functioning of the Mozambique mission. Indeed, if the court had adopted Mr. Fernandez's position that he had complete immunity here, the court would have placed Mrs. Fernandez in a position of having no forum to adjudicate her rights, while conferring an unjust and unsupportable windfall on the petitioner. This is precisely the type of abuse the drafters of the Vienna Convention sought to avoid when providing for exceptions to immunity.

Petitioner also argues repeatedly that through adjudication of rights and interests in the marital home, Mrs. Fernandez will somehow be able to pursue an *in personam* divorce action which the Vienna Convention meant to proscribe. This is not true. The Connecticut Supreme Court held that the trial court does *not* have personal jurisdiction to decide issues concerning alimony, attorney's fees and distribution of defendant's property other than the marital residence which is located within the State of Connecticut, so long as the defendant maintains his diplomatic status. In fact, the Connecticut Supreme Court limited the trial court's jurisdiction to very narrow confines, and the petitioner cannot ignore the fact, that regardless of whether this action is a divorce action or any other kind of lawsuit, it involves a direct interest in real property that is located within the State of Connecticut.

B. The Connecticut Supreme Court Did Not Improperly Expand The Waiver.

Mr. Fernandez argues that this case presents an important question as to the interpretation of a waiver of diplomatic immunity because the Connecticut Supreme Court ignored the limitations imposed by the waiver in this case. As an initial matter, this Court should not exercise its discretionary jurisdiction solely to "second-guess" the Connecticut Supreme Court regarding the scope of the waiver. More important, however, petitioner has misconstrued the court's decision. The Connecticut Supreme Court did not find that the waiver submitted by the People's Republic of Mozambique contained a provision allowing the trial court to adjudicate the parties' interest in real property. No such finding was necessary as Article 31 of the Vienna Convention already permits this. The court simply held that once the waiver regarding marital status was issued, Mrs. Fernandez's claim of ownership in the family residence could be heard (Pet. App. 12a).

Because the waiver permitted the parties to dissolve their marital status, Connecticut's equitable distribution statute, Connecticut General Statutes § 46b-81, can now be utilized to adjudicate the parties' respective interests in their marital residence. Even the State Department in its *amicus* brief submitted to the Connecticut Supreme Court in support of Mr. Fernandez's claim of immunity, acknowledged that the waiver would facilitate the application of the real property exception contained in the Vienna Convention to the parties' marital home: "Because the People's Republic of Mozambique has now waived Ambassador Fernandez's immunity with respect to the dissolution of the marriage, however, it may be necessary for the superior court on remand to consider the applicability of this exception to such real property as the parties may own . . . ." (Brief of *Amicus Curiae* at 5-6, n.3).

The Connecticut Supreme Court correctly construed the waiver; further review by this Court is not required.

IV. THE STATE DEPARTMENT HAS NOT SOUGHT REVIEW OF THIS CASE.

The State Department, representing the interests of the United States Government in assuring that diplomats in this country are afforded the full protections of diplomatic immunity awarded under the Vienna Convention, was an active participant before the superior court and Connecticut Supreme Court. The State Department, however, has elected not to support petitioner before this Court, apparently satisfied that the Connecticut Supreme Court's decision correctly and appropriately balances the concerns of diplomatic immunity with the rights of injured third parties. The decision by the State Department not to request review of the Connecticut Supreme Court's decision is significant. If that court's decision has the "far-reaching" and "international" significance which petitioner claims it has, presumably the State Department would have made its views known to this Court. The State Department's silence, and apparent concurrence with the Connecticut Supreme Court's decision, is an additional reason why this case does not warrant review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 88-1042

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTONIO DEINDE FERNANDEZ,

Petitioner,

—v.—

BARBARA J. FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY BRIEF

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IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY BRIEF

The petitioner respectfully submits this brief in reply to respondent's brief in opposition to the petition.

1. Respondent, in her Statement of the Case, has set forth as facts certain matters that, in actuality, are nothing more than her *claims*. Her representations to this Court with respect to Ambassador Fernandez' actions, finances and diplomatic status have not been found to be facts by any court in this matter.

Procedurally all that has occurred at the trial court level is a hearing on, and a decision with respect to, the Ambassador's Motion to Dismiss. In that motion, Ambassador Fernandez sought a dismissal of this case based on his accredited status as an ambassador and the privileges and immunities to which he is entitled thereby under Article 31 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 ("Vienna Convention").

Respondent's claims in this matter have simply not been litigated.[1]

2. Respondent, referencing the legislative history of the Diplomatic Relations Act, dismisses the special consideration the Framers intended with respect to "cases affecting Ambassadors" as a "remarkable proposition." Respondent's Brief, 5. While the Diplomatic Relations Act, as codified at 28 U.S.C. 1351, does provide for concurrent original jurisdiction in the district courts with respect to actions involving ambassadors brought under that Act, the legislative history makes clear that there was no intention to interfere with this Court's jurisdiction. In this regard, the legislative history specifically states that any such interference would be improper:

> The district courts' jurisdiction in such suits will, however, remain concurrent with the jurisdiction of the Supreme Court. Article III, section 2, of the Constitution provides that "In all Cases affecting Ambassadors, other public Ministers and Consuls—the Supreme Court shall have original Jurisdiction." *Congress may not deny to the Supreme Court jurisdiction which is expressly granted to it by the Constitution, Marbury v. Madison*, 1 Cranch 137, 173 (1803).

S. Rep. No. 958, 95th Cong., 2d Sess. 6 *reprinted in* 1978 U.S. Code Cong. & Admin. News 1935, 1947 (emphasis added).

Congress may have expanded the forums available for the trial of permissible claims against diplomatic agents. But the non-exclusive nature of this Court's jurisdiction over cases "affecting Ambassadors" does not affect the appropriateness of utilizing the appellate jurisdiction of this Court to review claims that the assertion of jurisdiction by a state court over a

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1 Further, respondent's statements that the Ambassador's status is "contested" and merely "asserted" or "claimed" by him are simply not correct. Indeed, the petitioner's status as an ambassador is the only significant fact found by both courts below based upon the appropriate certification of the State Department and the testimony of that Department's Associate Chief of Protocol.

case affecting an ambassador conflicts with the provisions of an international treaty or convention. That is precisely the kind of a case that the Framers deemed to be so important as to come within this Court's original jurisdiction. When that kind of a case comes to this Court from a state court on certiorari, the case is infused with the same high degree of international importance that the Framers accorded such a case—an importance that fully warrants the grant of certiorari. As this Court observed in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334-35 (1816):

> *In respect to [cases affecting ambassadors], it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to all cases . . . .*
>
> The vital importance of all the cases [affecting ambassadors] to the national sovereignty, might warrant such a distinction. . . . *This class of cases . . . affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety* . . . . All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, *and, of course, should extend to all cases whatsoever.*

(Emphasis added).[2]

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2 *See also* Hamilton, *The Federalist No. 81*, in 4 Kurkland and Lerner, The Founder's Constitution, 244 (1987):

> The supreme court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers and consuls, and those in which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent,

The vital importance of a considered resolution by this Court of the issues involved in this case could not be more clear. This case directly affects foreign relations and international expectations. It directly calls into question the effect that this nation will give to two significant provisions of the Vienna Convention. The ultimate resolution of those issues, to be sure, will affect Ambassador Fernandez. But more importantly, the ultimate resolution of those issues will set the standard for types of claims that may be pursued against ambassadors under Article 31 of the Vienna Convention and the treatment that sovereign nations may expect in the future with respect to waivers of sovereign immunity under Article 32 of that Convention.

3. Without any basis whatever, respondent represents to this Court that the State Department is "apparently satisfied" and is in "apparent concurrence with the Connecticut Supreme Court's decision" and "has elected not to support petitioner before this Court." Respondent's Brief at 11. It is petitioner's understanding that, regardless of the significance of a particular case, the Solicitor General rarely, if ever, participates in the briefing as *amicus curiae* with respect to a petition for certiorari where the federal government was not a party below. Moreover, based on its brief to the Connecticut Supreme Court, it is clear that the State Department did not endorse the "back

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it is both expedient and proper, *that such questions should be submitted in the first instance to the highest judiciary of the nation.*

(Emphasis added). Storing, *The complete Anti-Federalist*, in 4 Kurkland and Lerner, The Founder's Constitution, 234 (1987) ("Should any question arise between a foreign consul and any of the citizens of the United States however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the *first* instance to be heard in the supreme court, however inconvenient to the parties, and however trifling the subject of the dispute."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 396 (1821) (recognizing that no part of this Court's original jurisdiction is "so much required by national policy" as jurisdiction over matters affecting Ambassadors); 17 Wright, Miller & Cooper, Federal Practice and Procedure, § 4050 (2d ed. 1988). ("The Supreme Court has found that the reason for establishing this branch of original jurisdiction has been concern for the delicate nature of international relations . . .").

door" approach to divorce jurisdiction over ambassadors advocated by respondent and ultimately authorized by the Connecticut Supreme Court's decision in this matter. (Brief of *Amicus Curiae* at 6, n. 3: ("We also note, in this regard, that the mere fact that real property might be involved in the ultimate resolution of this suit does not bring [this action] within the real property exception of Article 31.")). The State Department is not a party to this matter and if, despite its general policy, it sees fit to file an *amicus curiae* brief, it is certainly capable of stating its own position therein.

For all of the foregoing reasons, as well as those set forth in the Petition, petitioner, Ambassador Antonio Deinde Fernandez, respectfully requests that this Court grant certiorari in this matter.

Respectfully submitted,

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No. 88-1042

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTONIO DEINDE FERNANDEZ, PETITIONER

v.

BARBARA J. FERNANDEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly held that Article 31(1)(a) of the Vienna Convention on Diplomatic Relations permits the Connecticut courts, in this divorce action against an ambassador, to determine the spouses' entitlement to Connecticut real estate, after the nation that the ambassador represents has granted a waiver of the ambassador's diplomatic immunity solely for the purpose of permitting dissolution of the marriage.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1042

ANTONIO DEINDE FERNANDEZ, PETITIONER

v.

BARBARA J. FERNANDEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Barbara Fernandez is a citizen of the United States. She and petitioner Antonio Deinde Fernandez were married in the United States in 1961.[1] They have three grown children, all of whom were born in the United States. Pet. App. 3a.

In 1974, the parties purchased a home in Greenwich, Connecticut.[2] Although petitioner traveled extensively, he and Mrs. Fernandez occupied the house as husband and wife for ap-

[1] Respondent believes that petitioner is a citizen of Nigeria. Br. in Opp. 1; Pet. App. 4a n.3.

[2] The property was purchased and initially held in the name of a corporation, Santa Barbara Estates U.S.A., Inc., of which respondent was the president and principal shareholder. Pet. App. 3a-4a.

proximately ten years. In late 1984 or early 1985, petitioner voluntarily left the marital home; Mrs. Fernandez has continued to reside there. Pet. App. 3a, 4a; Br. in Opp. 2. A short time later, petitioner became Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique and was accepted as such by the United States. Pet. App. 3a; see Pet. 6 (petitioner was accepted as Ambassador in February 1985).

2. In January 1987, Mrs. Fernandez filed for divorce in Connecticut Superior Court and asked, among other things, for an assignment " 'of all of defendant's right, title and interest in [the Greenwich real estate]' " and "a portion of [Ambassador Fernandez's] estate, support payments and attorneys' fees." Pet. App. 3a (quoting complaint). Ambassador Fernandez moved to dismiss the action on the ground that it was barred by Article 31(1) of the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3240, T.I.A.S. No. 7502, 500 U.N.T.S. 95, which establishes the immunity of diplomatic agents from the criminal, civil, and administrative jurisdiction of the receiving state, with certain exceptions.[3] In October 1987, the superior court denied the

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[3] Article 31, 23 U.S.T. 3240-3241, provides, in pertinent part:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

The Convention entered into force for the United States on December 13, 1972. Pursuant to the agreement between the United States and the United Nations (Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, T.I.A.S. No. 1676,

motion to dismiss. Pet. App. 22a-24a. The court reasoned that, under Connecticut law, an action for divorce is a "family relations matter," not a civil action, and therefore does not fall within the scope of the treaty provision granting diplomatic immunity from civil jurisdiction. *Id.* at 23a. The court also ruled, in the alternative, that even if the suit for divorce was a civil action, the court could at least dissolve the marriage without exercising personal jurisdiction over Ambassador Fernandez, because under Connecticut law a dissolution proceeding is an action *in rem* and not *in personam*. *Id.* at 24a (citing, inter alia, *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 545, 295 A.2d 519 (1972)).

Ambassador Fernandez sought and obtained permission for an interlocutory appeal to the Supreme Court of Connecticut. See Pet. App. 2a-3a n.2.[4] After the Connecticut Supreme Court had accepted jurisdiction of the case, the United States requested that the Government of the People's Republic of Mozambique, pursuant to Article 32 of the Vienna Convention, 23 U.S.T. 3241, waive the Ambassador's immunity from the court's civil and administrative jurisdiction with respect to all aspects of the divorce action. See Gookin Aff. para. 4 (June 16, 1988). The Mozambique Government executed a more limited waiver of diplomatic immunity, providing (Pet. App. 6a n.7):

> [T]he People's Republic of Mozambique hereby waives the immunity extended by the United States of America to Ambassador Antonio Deinde Fernandez under the provisions of the Vienna Convention on Diplomatic Relations to the following limited and restricted extent only, viz: to permit the Superior Court for the Judicial District of Stamford/

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11 U.N.T.S. 11), an ambassador serving as a member state's resident representative to the United Nations is entitled to the same immunity under the Vienna Convention as is enjoyed by a diplomatic agent accredited to the United States. Furthermore, pursuant to 22 U.S.C. 254d, an action barred by the immunity provisions of the Vienna Convention must be dismissed. See Pet. App. 5a nn.4, 5.

[4] The United States participated as amicus curiae in the Connecticut Supreme Court to present its view that the reasoning of the superior court was in error. The government contended that, in the absence of a waiver of diplomatic immunity, the Vienna Convention bars divorce actions.

> Norwalk at Stamford, Connecticut, U.S.A. to enter an order dissolving the marital status only between Ambassador Antonio Deinde Fernandez and his wife, Barbara J. Fernandez, in a civil action presently pending in said Court * * *. This limited and restricted waiver of diplomatic immunity does not encompass, and shall not be construed as encompassing, any waiver whatsoever of Ambassador Antonio Deinde Fernandez' diplomatic immunity under said Vienna Convention on Diplomatic Relations from *in personam*, *in rem* or any other type of jurisdiction whatsoever with respect to his person or property or any property in which he may have or claim to have an ownership interest including, without limiting the generality of the foregoing, his immunity from any awards of property and/or alimony that might otherwise be appropriate in any such matrimonial proceeding. The limited purpose of this waiver of diplomatic immunity is solely to permit the marital status only between the parties to be dissolved without Mrs. Fernandez having to institute an action for divorce in the People's Republic of Mozambique.

3. a. The Connecticut Supreme Court affirmed the judgment of the superior court declining to dismiss the action and remanded the case for further proceedings. Pet. App. 2a-16a. The court noted at the outset that, in light of the intervening limited waiver of immunity, there was no longer a dispute about the trial court's jurisdiction to dissolve the marriage. Accordingly, the only question before the state supreme court was whether the trial court, on remand, would have authority to award the real property or other property or money claimed by Mrs. Fernandez in her complaint for divorce. *Id.* at 6a-7a. The state supreme court held that Mrs. Fernandez's claim for the Connecticut real estate was not barred by Article 31(1) of the Vienna Convention but that her other claims were. Pet. App. 6a-7a.

The court first rejected the trial court's view that divorce actions are not within the criminal, civil, or administrative jurisdiction as to which Article 31(1) grants ambassadors immunity. Pet. App. 7a-9a. The court explained that even under Connecticut

law an action for divorce is a civil action. *Id.* at 7a-8a. In any event, the court held, the statements of drafters of the Vienna Convention,[5] together with both post- and pre-Convention case law,[6] made clear that Article 31(1)'s grant of immunity covers divorce proceedings. Pet. App. 8a-9a.

The Connecticut Supreme Court ruled (Pet. App. 9a), however, that Mrs. Fernandez's "claim to the title of the Greenwich home and real estate" came within Article 31(1)(a)'s "real action" exception, which excludes from the general grant of immunity "a real action relating to private immovable property situated in the territory of the receiving State, unless [the diplomat] holds it on behalf of the sending State for purposes of the mission." The court began its discussion of the exception by noting that, in light of the traditionally strong interest of states both in domestic relations and in the ownership and possession of real estate, "but for diplomatic immunity, [Mrs. Fernandez's] claim for real property incident to marital dissolution would readily be entertained by [the state] courts." Pet. App. 10a. While acknowledging that those state interests were overridden by any contrary command of the Vienna Convention, the court explained that, even before adoption of the Convention in 1961, it was generally recognized that diplomatic immunity did not extend to "actions relating to real property." *Id.* at 11a. The court also quoted (*ibid.*) a passage in a Department of State position paper prepared in 1961 (for the United States delegation to the negotiating conference)

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[5] The court quoted (Pet. App. 8a) a statement of the special rapporteur that "he 'could not imagine a proceeding which would not fall under one of the three jurisdictions – criminal, civil and administrative.' 1 Y.B. Int'l L. Comm'n 147 (1958)." The court also quoted (*ibid.*) a statement of one of the drafters that " '[t]he immunity of the diplomatic agent was maintained even in the . . . matter of divorce, because a divorce action under the local jurisdiction was incompatible with his dignity as a diplomat." 1 Y.B. Int'l L. Comm'n. 97 (1957)."

[6] *Shaw* v. *Shaw*, 3 W.L.R. 24, 27, 3 All. E.R. 1, 3 (Fam. 1979) (dicta construing Article 31 to bar divorce proceedings against an accredited diplomat); *Carrera* v. *Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949) (dismissing action for marital separation, including custody of and support for child, on grounds of diplomatic immunity); *Tsiang* v. *Tsiang*, 194 Misc. 259, 260, 86 N.Y.S.2d 556 (Sup. Ct. 1949) (dismissing marital separation action on grounds of diplomatic immunity). See Pet. App. 8a-9a.

that not only recognized states' exclusive jurisdiction over real property within their borders but explained that, "since actions respecting real property are usually *in rem*, it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the proper performance of his diplomatic functions." 7 M. Whiteman, *Digest of International Law* 407 (1970). Against that background, the Connecticut Supreme Court, stating that the question presented was a matter of first impression (Pet. App. 11a), held that the real action exception in Article 31(1)(a) of the Convention should be construed to allow adjudication of Mrs. Fernandez's "claim for ownership of the family residence * * * in this case, in which the sending state has waived any claim of immunity with regard to the dissolution of the marriage." Pet. App. 12a.[7]

The court's primary ground for its conclusion was that the language of the exception "eschews any technical focus on the *form* of action brought and instead raises the sole question of whether the real property is *itself* the disputed object of the litigation." Pet. App. 12a. Relying on two leading commentators (there being no published cases or drafters' statements construing the real action exception), the court indicated that a "real action" within the meaning of Article 31(1)(a) is one in which the plain-

[7] In a footnote attached to that statement, the court said (Pet. App. 12a n.9) that it need not decide either (a) whether the state courts "would in any case have jurisdiction to dissolve a Connecticut marriage that, in its entirety, antedated the assumption of ambassadorial status" or (b) whether "the trial court's in rem jurisdiction, which is ancillary to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn."

In its brief *amicus curiae* to the Connecticut Supreme Court, the United States stated, in discussing the action as a whole, that in the absence of a full waiver of diplomatic immunity, the case "must be dismissed except to the extent of the waiver of diplomatic immunity that has been executed." Gov't Amicus Br. 6. In a footnote, the United States addressed specifically the question of the real property exception. It stated first that "the mere fact that real property might be involved in the ultimate resolution of this suit does not bring it within the real property exception," and then concluded: "Because the People's Republic of Mozambique has now waived Ambassador Fernandez's immunity with respect to the dissolution of the marriage, * * * it may be necessary for the superior court on remand to consider the applicability of this exception to such real property as the parties may own." *Id.* at 6 n.3.

tiff claims ownership or possession of real property and seeks, as relief, a declaration of title to, or sale or possession of the property. Pet. App. 12a. This, the court concluded, is such a case (*ibid.*):

> The very object and purpose of [Mrs. Fernandez's] complaint is a vindication of her claimed right of ownership of the real estate. The substance of her claim is that she is entitled to the home as an immediate and essential consequence of her marital dissolution.

Consequently, the court added (*id.* at 13a), permitting adjudication of the real property claim in this case would not, contrary to petitioner's argument, undermine the Convention's general grant of immunity by broadly allowing attachment of realty as a means of satisfying or securing a judgment on an unrelated cause of action. "This is simply not a case where the plaintiff seeks to satisfy a collateral judgment in her favor by forcing the sale or transfer of unrelated real property. * * * When the complaint alleges a direct right of ownership of the thing itself, * * * such a concern finds no basis in law or fact." *Ibid.*

The court found its interpretation of the real action exception bolstered by the Convention's overall approach. Citing the Convention's statement, in its preamble, 23 U.S.T. 3230, that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of [the] diplomatic missions," the court explained that "the overriding emphasis of the Convention is functional"—"justif[ying] immunity by the need to safeguard the actual functioning of the diplomatic mission." Pet. App. 13a. The court agreed with one commentator's view that the immunity provisions of the Convention in particular struck a balance between the immunity and inviolability necessary to protect a diplomat's official functions and " 'the conflicting need to minimise abuse of immunity by diplomats in regard to matters which have nothing to do with their job and to provide a forum for those cases involving land where a plaintiff might otherwise have no other.' " *Id.* at 13a-14a (quoting E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations* 4 (1976)).

Accordingly, the court remanded the case for "the trial court to determine whether to grant [Mrs. Fernandez] title to the

disputed real property." Pet. App. 14a. The court added that the trial court should also inquire, on remand, whether the Ambassador's interest in the Greenwich home is independently protected by Article 30 of the Convention, which recognizes the inviolability of the "private residence of a diplomatic agent." Pet. App. 14a. The court held, however, that Mrs. Fernandez's claims for support payments and ancillary monetary relief would not be within the scope of the trial court's authority, because those claims are barred by the Vienna Convention. *Id.* at 14a-16a. Unlike the real property claim, the court explained, these additional claims are not excepted from the immunity bar by "a specific treaty provision" (*id.* at 15a); and, contrary to Mrs. Fernandez's contention, whatever due process right she might have to obtain dissolution of her marriage under *Boddie* v. *Connecticut*, 401 U.S. 371 (1971),[8] that right does not encompass any right to "proprietary relief incident to divorce" (Pet. App. 15a-16a).

b. Two judges of the Connecticut Supreme Court dissented in part. Pet. App. 16a-21a. In their view, the real action exception to diplomatic immunity could not properly support jurisdiction over Mrs. Fernandez's claim to the Greenwich home to the extent that the claim, made under Conn. Gen. Stat. § 46b-81 (1986), is predicated specifically on the dissolution of the marriage. The dissenters reasoned that the expressly limited waiver of immunity "cannot serve as a vehicle upon which to predicate any of the relief normally attendant upon a dissolution of marriage." Pet. App. 17a. Rather, they concluded, only the determination of the "present interests of the parties in that real estate," not the transfer of interests between the parties, is within the scope of the real action exception. *Id.* at 18a.[9] To allow the wide-ranging

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[8] The court noted that, in light of the waiver of immunity from dissolution of the marriage in this case, it need not decide whether *Boddie* would entitle Mrs. Fernandez to have access to the Connecticut courts to obtain a dissolution of her marriage. Pet. App. 15a n.12.

[9] Thus, the dissent disagreed with what it described as the "implications" of the majority opinion that such a transfer could be ordered. Pet. App. 16a.

inquiry under Conn. Gen. Stat. § 46b-81 (1986),[10] the dissenters explained, would frustrate the concern of the Vienna Convention's drafters that a divorce proceeding against an ambassador would be ' "incompatible with his dignity as a diplomat.' " Pet. App. 19a (quoting *Summary Records of the 402d Meeting* [1957], 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/C N. 4/Ser. A/1957).

In the dissenters' view, however, Mrs. Fernandez's claim for the Greenwich home was not based solely on the dissolution of the marriage. Pet. App. 19a-21a. They stated that she also claimed an equitable interest in the real estate based on her interest in Santa Barbara Estates, the original owner, and on petitioner's alleged improper transfer of title to his name after the parties were separated. *Id.* at 20a. That claim, the dissenters concluded (*ibid.*), "undoubtedly would qualify" under the real action exception of Article 31(1)(a). Accordingly, the dissenters would have remanded the case for consideration of that claim, as well as of Ambassador Fernandez's claim that the Greenwich home is protected as his "private residence" under Article 30. Pet. App. 20a-21a.

DISCUSSION

Petitioner contends that the Connecticut Supreme Court's ruling is erroneous for two reasons: first, that it adopts an incorrect interpretation of the real action exception to Article 31(1)'s general grant of immunity to ambassadors (Pet. 13-19); second, that it relies on a limited waiver of immunity as a vehicle for assuming jurisdiction beyond the scope of that waiver (Pet. 19-21). Neither contention, we believe, warrants this Court's review in this proceeding.

Petitioner's second contention is of substantial concern to the United States, for if the opinion below is construed as petitioner

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[10] That statute allows the trial court, in determining what property to assign from one spouse to the other, to consider "the length of the marriage, the causes for the * * * dissolution * * *, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." Conn. Gen. Stat. §§ 46b-81(c) (1986).

suggests, it sets a dangerous and erroneous precedent that might be construed as approving the disregard of the terms of waivers of immunity. Nevertheless, we do not believe that the opinion needs to be read as relying on the limited waiver, as such, to support more jurisdiction than the waiver covers.

Petitioner's first question, concerning the correctness of the Connecticut Supreme Court's construction of the real action exception, is presented by the ruling below. That question, however, is a difficult one, and the ruling below on the issue is not itself of substantial concern to the United States or, in our view, of sufficient importance to warrant review. As petitioner acknowledges (Pet. 13-14), this case involves a question of first impression for the courts. And while it would appear that the decision below is final for jurisdictional purposes,[11] the ruling is interlocutory, and it is not entirely clear whether the trial court, on remand, would actually reach the equitable-distribution inquiry that raises the most troubling questions under the Vienna Convention.[12]

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[11] Because petitioner asks this Court to find him immune from suit on *any* property claim made by Mrs. Fernandez, including the property claim that the dissenters in the Connecticut Supreme Court would allow to be adjudicated, his claims in this Court would, if accepted, effectively terminate the only remaining part of the litigation that is contested. For that reason, and because the defense is one of *immunity* with respect to the property claim, we agree with petitioner (Pet. 11-12) that the finality requirement of 28 U.S.C. 1257 is satisfied. See *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975).

[12] Government records indicated that, until recently, Ambassador Fernandez held permanent resident status in the United States under the immigration laws. Under Article 38 of the Vienna Convention, petitioner would therefore appear, until recently, not to have been entitled to diplomatic immunity in this case. Article 38(1), 23 U.S.T. 3245, states: "Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." This divorce action does not involve such official acts, and the United States has not granted additional immunities with respect to the matters at issue here.

Although Ambassador Fernandez contends that he renounced such status in 1985, we understand that the Ambassador has also recently submitted

1. a. The only aspect of the decision below that, in the government's view, has potentially serious implications for international diplomatic practice is the court's reference (Pet. App. 12a) to the limited waiver of immunity filed in the action. Petitioner suggests (Pet. 19-21), in effect, that because of that reference the decision below might be read as holding that a limited waiver of immunity can, as such, have the unintended effect of vesting the courts with jurisdiction beyond the scope of the waiver.[13] So construed, the decision would be incorrect and could cause substantial difficulties in the conduct of international relations.

All of the more than 140 parties to the Vienna Convention accept that the successful conduct of diplomatic relations requires strict recognition of the Convention's guarantees of diplomatic immunity.[14] Consistent with that fundamental feature of in-

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a formal renunciation of that status. In the government's view, that renunciation renders Article 38 inapplicable in any future proceedings in this case. It is the longstanding practice of the Department of State to equate lawful permanent resident status under the immigration laws with being "permanently resident" within the meaning of Article 38 of the Vienna Convention.

[13] The court did not find jurisdiction that violated an express *condition* of the waiver: although the waiver reflects an assumption that the Connecticut courts would only dissolve the marriage, the waiver merely defined what immunity was being waived. Accordingly, the waiver does not by its terms preclude the exercise of any such additional jurisdiction that has another lawful basis; nor is the waiver by its terms rendered inoperative by the assumption of such jurisdiction.

[14] See Senate Comm. on Foreign Relations, 96th Cong., 1st Sess., *Legislative History of the Diplomatic Relations Act* 12-14 (Comm. Print 1979); *Vienna Convention on Diplomatic Relations: Hearing on Exec. H., Before the Subcomm. of the Sen. Comm. on Foreign Relations, 88th Cong., 1st Sess.*, 89th Cong., 1st Sess. 3 (1965) [hereinafter *1965 Hearing*] (testimony of State Department Legal Adviser) ("When a state agrees to receive a foreign diplomatic mission, it assumes under international law the obligation to accord to the mission and its personnel appropriate privileges and immunities. These diplomatic privileges and immunities are not benefits for the individuals concerned, for the diplomats themselves. Instead they are protections which experience has long established are essential to assure the effective performance of the functions of diplomatic missions. These protections are what the United States needs for its missions and personnel abroad, and by the same token these are what

ternational law, although Article 32(1) of the Vienna Convention permits a sending state to waive immunity for its diplomats, Article 32(2) states that "[w]aiver must always be express." To underscore the prohibition on implied waivers, Article 32(4) requires that, even after a civil or administrative proceeding has resulted in a judgment, a separate waiver is required for execution of the judgment. Those provisions require that a receiving state strictly adhere to the terms of any waiver of immunity.

In practice, limited waivers pursuant to Article 32 have proved to be extremely useful in mitigating the sometimes harsh consequences of immunity in situations where permitting jurisdiction would pose no threat to diplomatic functions. The United States, in particular, frequently issues limited waivers to permit members of its diplomatic missions to appear in foreign courts. The principle of strict observance of the terms of limited waivers, to which the United States and the other signatories to the Vienna Convention have scrupulously adhered, provides needed protection to the more than 3500 United States diplomats abroad. Any departure from that principle by the United States would not only be regarded as a violation of the Convention by other nations but could lead to reciprocal action against United States diplomats.[15] The resulting vulnerability of diplomats to unconsented-to jurisdiction, perhaps including civil and criminal charges, could have serious foreign policy and security consequences. In addition, any disregard of the terms of immunity waivers would undoubtedly discourage countries from providing

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the United States must be willing to provide here in the United States. This is the rationale for the convention and proposed legislation.").

[15] The importance of reciprocity, which underlies all relations between nations, is recognized in Article 47 of the Vienna Convention, 23 U.S.T. 3248-3249, and in 22 U.S.C. 254c. See U.S. Dep't of State, *Pub. No. 9162, Digest of United States Practice in International Law* 108-109 (1978). See also Office of Protocol and Office of Foreign Missions, U.S. Dep't of State, *Pub. No. 9533, Guidance for Law Enforcement Officers* 2 (Mar. 1987) ("failure of the authorities of the United States fully to respect the privileges of foreign diplomatic and consular personnel may complicate diplomatic relations between the United States and the other State concerned. It also may lead to harsher treatment of U.S. personnel abroad, since the principle of reciprocity has from the most ancient times been integral to diplomatic and consular relations.").

limited waivers for the officials to appear in other countries' courts, for fear that the terms of the waivers would again be ignored. Such over-protective refusals to waive immunity would often disserve the interests of justice.

b. Notwithstanding these concerns, we believe that the Connecticut Supreme Court decision need not be read as petitioner suggests, and we are for that reason much less concerned about the use of the decision in the future. First, even if the opinion is read as relying on the waiver as such, the decision goes no further than to indicate that a waiver may make applicable an exception to immunity from jurisdiction in the Vienna Convention itself: the court found that the real action exception of Article 31(1) defeated diplomatic immunity with respect to Mrs. Fernandez's real property claim. Hence, the decision could not, under any reading, support a state's use of a limited waiver to find broader jurisdiction not covered by an express provision of the Vienna Convention.[16]

Second, the Connecticut Supreme Court's reference to the waiver of immunity need not, in our view, be understood as reflecting any reliance on the waiver *as such*. Rather, the court's opinion may be read as finding the waiver significant (as a limitation on its present ruling)[17] only because the waiver supplied the necessary substantive predicate (dissolution) for Mrs. Fernandez to raise her claim to property upon dissolution. Since that substantive predicate—dissolution—may be supplied in ways other than by waiver,[18] the court's opinion, so construed, does not raise

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[16] The Connecticut Supreme Court's ruling that there was no jurisdiction to consider the claims for other than real property confirms that an express Vienna Convention exception to immunity was a necessary component of the rationale below.

[17] Indeed, the court did not actually rely on the waiver as part of its analysis, but merely referred to the waiver in order to confine the scope of its ruling, leaving for another day any questions about the applicability of the real action exception in other circumstances. See Pet. App. 12a & n.9.

[18] Thus, under the "divisible divorce" doctrine, dissolution can take place in one jurisdiction (perhaps ex parte, based on the domicile of one spouse only), and adjudication of property and support-obligation issues in another. See Restatement (Second) of Conflict of Laws §§ 71, 77 (1971); *Vanderbilt* v.

any separate question specifically about the use of waivers to sustain jurisdiction beyond their terms.[19] (Nothing in the court's analysis of the real action exception would have been different had the court, in limiting its holding, referred simply to the lack of dispute concerning dissolution instead of referring to the waiver.) Under this interpretation, which we think is a plausible one, the opinion simply presents the question whether the real action exception of Article 31(1)(a) permits the adjudication of equitable-distribution real property claims that arise upon dissolution of a marriage. That question, which does not implicate special concerns regarding adherence to the terms of waivers of immunity, is of course the primary question that petitioner presents.

2. a. In our view, the applicability of the real action exception to this case presents a difficult question. The language of the exception itself—"real action relating to private immovable property"—is hardly clear, as petitioner himself acknowledges (Pet. 14, endorsing commentator's observation that "[t]he

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Vanderbilt, 354 U.S. 416 (1957); *Estin* v. *Estin*, 334 U.S. 541 (1948); *Rozan* v. *Rozan*, 49 Cal. 2d 322, 317 P.2d 11 (1957). In the case of a person having diplomatic immunity in one jurisdiction, such a dissolution might occur in another jurisdiction where no such immunity can be claimed.

We note, too, without here expressing our view on the issues, that the Connecticut Supreme Court left open the questions whether the state courts might be (a) obliged by the federal Constitution (which would override the Vienna Convention) to grant a dissolution of the marriage to Mrs. Fernandez (see *Boddie* v. *Connecticut*, *supra*) or (b) entitled, without violating the Convention, to dissolve the marriage without exercising personal jurisdiction over Ambassador Fernandez (see *Litvaitis* v. *Litvaitis*, *supra*).

[19] We believe the Connecticut Supreme Court may have been thinking along the foregoing lines, given the absence of any other potentially valid view of the role of the waiver in this case. But since no analysis of the law governing divisible divorce was presented to that court, it is not clear to what extent the Connecticut courts would apply Conn. Gen. Stat. § 46b-81 in divisible divorce cases. See Conn. Gen. Stat. § 46b-71 (1986) (party to foreign matrimonial judgment may file judgment in Connecticut courts, which must treat it as Connecticut judgment but may modify it in accordance with the foreign jurisdiction's substantive law); *Taylor* v. *Taylor*, 168 Conn. 619, 362 A.2d 795 (1975) (statutory provision no longer in force, which provided for assignment of property and alimony, construed not to apply in action brought by wife where dissolution previously obtained by husband outside Connecticut).

wording of Article 31(1)(a) contains several ambiguities"). The dual requirement that the action be a "real action" and that it "relat[e]" to real property does, however, seem to imply a two-fold focus on real property, as the decision below and the commentators it relied on both suggest (Pet. App. 12a): first, the relief sought should directly involve the property, in that it would award possessory or ownership interests; second, the substance of the claims being litigated should concern the real property, in that the claims should involve rights in the property.[20] Both conditions, of course, would be satisfied by a classic in rem action (brought to affect the interests in a thing of all persons in the world), but neither the Convention language nor drafters' statements establish that the real action exception is limited to such actions. Indeed, that the exception should be somewhat broader is indicated both by the fact that real actions are covered by an *exception* to the general grant of immunity from jurisdiction over diplomats personally and by the Department of State's 1961 statement, quoted by the Connecticut Supreme Court (Pet. App. 11a; see p. 6, *supra*), that actions respecting real property are "usually" in rem.[21]

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[20] The passages quoted by petitioner (Pet. 14-16), which are themselves not precise or uniform in their definitions of "real action" and which involve contexts quite different from the present, tend to confirm that the phrase, "real action relating to private immovable property," would have been generally understood as having dual focus on the relief sought and on the nature of the claim.

That "real action" and "relating to private immovable property" are not wholly redundant in the provision—and that "real action" suggests that the relief requested involve possession or ownership or the like—is indicated by the fact that the former phrase has in various settings, including notably in civil law countries, been applied to actions involving movable property. See Pet. 16 (Pomeroy notes that, in Roman law, "real action" was not confined to realty); E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations* 159-160 (1976) (suggesting civil law meaning of "real action" in Article 31(1)(a)); 75 C.J.S. *Real Actions* § 1 (1952); Harvard Law School, *Research in International Law*, 26 Am. J. Int'l L. 15, 164, 174 (Supp. 1932) (pre-Vienna Convention "codifications" that used "real actions" or "realty actions" and applied to personal as well as real property).

[21] Statements from the process of drafting the Convention do not otherwise appear to provide significant additional illumination on the scope of the

The pre-Vienna Convention case-law and practice background involving property and domestic relations is of only limited help in interpreting the Convention as applied in this case. There appears to have been no clearly articulated and uniformly accepted view regarding the scope of a receiving state's jurisdiction to adjudicate disputes involving diplomats and real property, but the cases and treatises suggest, consistent with the dual focus of Article 31(1)(a)'s language, that such jurisdiction was narrowly confined, at most, to suits seeking the award of property interests based on claimed rights in the property.[22] However, no case of which we are aware involved, as the present case does, a claim for real property where the substantive predicate of marital dissolution was present: all of the marriage-related cases either involved claims for general support or maintenance or would have required adjudication of the predicate issue of dissolution.[23] In

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exception. See E. Denza, *Diplomatic Law—Commentary of the Vienna Convention on Diplomatic Relations* 161 (1976) ("There was no discussion of the meaning of 'real action' at any stage of preparation of the Vienna Convention."). See also Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 118-126 (1962) (detailed summary of proceedings leading to promulgation of Convention); *id.* at 120 (quoting 1957 comment by United States that "in respect of real property owned by [a diplomat] in his private capacity * * * court proceedings are usually in rem rather than in personam"). There are apparently no published cases interpreting the exception. See Pet. 14.

[22] See Pet. App. 11a and sources cited; see also *Agostini* v. *De Antueno*, 99 N.Y.S.2d 245, 199 Misc. 191, 17 I.L.R. 295 (Mun. Ct. 1950), (upholding jurisdiction against ambassador in suit to recover possession of real property); *In re Suarez*, 117 L.T.R. 239 (Ch. 1917) (described in Comment, *Immunities of Diplomatic Officers*, 27 Yale L.J. 392 (1918)) (finding immunity from sequestration of property of diplomat in suit to recover on duty owed by diplomat as a private trustee); 4 G. Hackworth, *Digest of International Law* 534 (1942) (Department of State urging recognition of immunity in local attachment case; nature of claim not specified); 4 J. Moore, *A Digest of International Law* 635-639 (1906) (Department of State suggesting immunity in suit by landlord regarding termination of lease).

[23] See *Carrera* v. *Carrera*, 174 F.2d 496 (D.C. Cir. 1949); *Tsiang* v. *Tsiang*, 194 Misc. 259, 86 N.Y.S.2d 556 (Sup. Ct. 1949); *Carbone* v. *Carbone*, 123 Misc.

any event, the Vienna Convention was understood to represent a tightening of standards for immunity, perhaps specifically with respect to the real action exception. See *1965 Hearing* 7, 15 (testimony of State Department Legal Adviser).

b. Against this background, it seems that the real action exception should apply, at its core, to an action brought to settle title (or other ownership or possessory interests) in real property, against the whole world or particular persons, based on preexisting claims of property rights. That much seems not only consistent with the Convention's language and background but necessary to vindicate a state's "strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property * * *." *Shaffer* v. *Heitner*, 433 U.S. 186, 208 (1977); see Pet. App. 10a. In most if not all such cases, moreover, the plaintiff is likely to have access to no other forum with jurisdiction to render and effectively enforce a judgment on the claim; and the real action exception was included in part for the purpose of trying to ensure the existence of a forum for the settlement of property disputes. See Pet. App. 14a. At the other extreme, the real action exception should not cover an action where the substantive claim (*e.g.*, a personal injury claim) has no relation to the real property and where the property serves only as the basis of jurisdiction or as satisfaction of the judgment.[24] If the exception covered such a case, it would, as petitioner suggests (Pet. 14, 17-18), permit the unconsented-to litigation of a vast array of essentially personal claims, making the real action exception a much larger exception to the general grant of immunity than was ever intended. Moreover, an essentially

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656, 206 N.Y.S. 40 (Sup. Ct. 1924). See also *Anonymous* v. *Anonymous*, 44 Misc. 2d 14, 252 N.Y.S.2d 913 (Fam. Ct. 1964) (immunity upheld in paternity proceeding).

[24] See Restatement (Second) of Conflict of Laws §§ 155, topic 2, at 191 (1971) ("In the second type of proceeding quasi in rem, the plaintiff does not assert that he has an interest in the thing, but asserts a claim against the defendant personally and seeks, by attachment or garnishment, to apply the thing to the satisfaction of his claim against the defendant.").

personal claim is far more likely than a classic property claim to require for its adjudication an intrusive inquiry into personal conduct, and any such inquiry implicates the general concerns of the Vienna Convention.[25]

c. The present case falls somewhere between those two extremes.[26] Although the relief requested is clearly the award of ownership (as well as possession) of real property, the substance of Mrs. Fernandez's equitable-distribution claim does not appear to involve a traditional, pre-litigation property right.[27] The claim does, however, directly concern the real property and is based on a statutory grant of entitlement (Conn. Gen. Stat. § 46b-81 (1986)), albeit one that allows a court to define future rights in property by reference to general equitable principles unrelated to the property itself.[28] Moreover, while the Connecticut

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[25] Of course, litigation that falls under the Article 31(1)(b) and (c) exceptions to immunity for successorship issues and for non-official professional and business activities may require quite intrusive and potentially embarrassing inquiries.

The overall functional approach of the Convention cannot serve to distinguish many cases within the real action exception from many outside it, as both classic property claims and ordinary tort claims, for example, may have nothing to do with a diplomat's official functions. The approach does provide a useful one-way negative check on including cases within the exception, as any case in which immunity is required to avoid interference with official functions should presumptively not come within the real action exception.

[26] Although the drafters of the Convention clearly intended that divorce actions would be within the general grant of immunity for "civil" actions, as the court below held, that fact does not mean that an action like the present—where there is no dispute about dissolution and (as relevant in this Court) only real property is claimed—is outside the scope of the real action exception. Hence, while petitioner is correct that the real action exception cannot cover all divorce actions "simply because real property could be involved by way of matrimonial award" (Pet. 18), that proposition does not resolve the present case.

[27] As the dissent below recognizes (Pet. App. 19a-21a), and contrary to petitioner's suggestion (Pet. 13 n.3), to the extent that Mrs. Fernandez is claiming an equitable or legal ownership interest in the Greenwich home by virtue of her interest in Santa Barbara Estates, that claim would seem quite close to a traditional pre-existing property rights claim and may therefore fall within the real action exception.

[28] In a community property jurisdiction that applied a rigid 50% division rule upon dissolution, the property claim would be closer to a traditional, pre-

Supreme Court did not describe Mrs. Fernandez's interest as a property right, as some other jurisdictions apparently have done,[29] it did refer to her "claimed right of ownership" (Pet. App. 12a) and her alleged "direct right of ownership" (*id.* at 13a); if the Vienna Convention issue turned on whether, under local law, Mrs. Fernandez has a vested property right, the state supreme court might well hold that she does. The court also characterized the jurisdiction over the property claim as "in rem jurisdiction." Pet. App. 12a. Furthermore, it is not clear whether Mrs. Fernandez could secure an adjudication of her claim to the Greenwich home in any forum other than the Connecticut courts. On the other hand, while the equitable-distribution claim seems unrelated to any official diplomatic functions, adjudication of the claim might require a quite intrusive inquiry into the Ambassador's personal affairs.[30]

3. The foregoing considerations make the primary question presented by petitioner a difficult one. We do not believe, however, that this Court need grant the petition in order to determine the contours of the real action exception generally or to decide whether the Connecticut Supreme Court correctly applied the exception in this case.

The application of the real action exception in a case like this does not present a question of great significance to international practice. There are no other judicial decisions on the subject;[31] the issue does not seem to have arisen before; and we do not envision any serious adverse spillover effects on other issues from

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existing property rights claim. Cf. 27B C.J.S. *Divorce* § 538 (1986) (equitable division may be appropriate even of community property).

[29] See, *e.g.*, *Questions re Imel* v. *United States*, 184 Colo. 1, 517 P.2d 1331 (1974) (filing of divorce action vests property right, scope of which is yet undefined, in plaintiff spouse).

[30] It may also raise nettlesome practical questions, such as whether, in deciding how much if any of the Greenwich home should be awarded to Mrs. Fernandez, the court must inquire into the *overall* holdings of the parties.

[31] The absence of a conflict among courts is an important consideration in deciding whether this Court should grant certiorari even in a case involving international treaty obligations.

allowing the Connecticut Supreme Court's construction of the real action exception to stand.[32] Moreover, given the interlocutory posture of the present case, it is hardly a certainty that the trial court will actually address the equitable-distribution real property claim, or do so in a manner that implicates serious concerns regarding intrusive inquiries into diplomats' personal affairs. Ambassador Fernandez may yet prevail on his claim that the Greenwich house is protected as his "private residence" under Article 30. Mrs. Fernandez may prevail on the Santa Barbara Estates ownership claim (if the state courts allow her to pursue it, see Pet. App. 14a n.11), a claim that the dissent below recognized as within the real action exception and that raises much less serious concerns about the intrusiveness of judicial inquiry than does the equitable-distribution claim. And the Connecticut Supreme Court has not foreclosed the possibility that judicial inquiry in applying Conn. Gen. Stat. § 46b-81 (1986) should, in light of the Vienna Convention, be more limited than usual.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[32] We are, of course, concerned about just such potential adverse implications with respect to the limited waiver of immunity. Notwithstanding those concerns, we do not think review of the petition is warranted on that basis either, since, as explained above, on close analysis the decision below does not rest on any separate holding concerning the scope of immunity waivers.

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No. 88-1042

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ANTONIO DEINDE FERNANDEZ,

Petitioner,

—v.—

BARBARA J. FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

The petitioner respectfully submits this brief in reply to the Brief for the United States as *Amicus Curiae.*

1. The Concerns Expressed By The United States Further Support The Granting Of The Petition

The United States in its brief has informed this Court that if the decision of the Connecticut Supreme Court relied on the Limited Waiver as a basis for assuming jurisdiction beyond the scope of that waiver, "the decision would be incorrect and could cause substantial difficulties in the conduct of international relations," would set "a dangerous and erroneous precedent that might be construed as approving the disregard of the terms of waivers of immunity" and would have all of the dire consequences delineated in the government's brief. (*Amicus* at

10, 11, 12). Because the only plausible reading of the decision of the Connecticut Supreme Court is that it did so utilize the Limited Waiver, the grave concerns expressed by the United States provide further support for the granting of the petition.

In a tortured attempt to obfuscate the clear involvement of the Limited Waiver in the decision below, the United States suggests two arguments—neither of which was even hinted at by the Connecticut Supreme Court. First, the government suggests that the Limited Waiver simply made available an exception otherwise set forth in the Convention. (*Id.* at 13) Secondly, the government argues that it is "not troubled" by the Limited Waiver because the Connecticut Supreme Court could have reached the same result by another means. (*Id.*) Wholly apart from the sophistry in these two arguments as demonstrated below, this very approach is wrong. To speculate that a court could have reached the same result in another fashion does not correct what the court in fact actually did decide nor erase the damaging precedential value of the case.

The majority in the decision below clearly relied on the Limited Waiver for the creation of its jurisdiction in this case. That the majority also relied upon the Limited Waiver for the creation of its jurisdiction over Ambassador Fernandez's property—as opposed to some other independent source for jurisdiction—is obvious. For, as the majority noted, "we need not decide whether the trial court's *in rem* jurisdiction, which is *ancillary* to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn." (Pet. App. at 12a n.9 (emphasis added)). Clearly, if the court's jurisdiction over the property was *ancillary* to its jurisdiction over the marital *res*—a jurisdiction it acquired only by virtue of the Limited Waiver—its jurisdiction over the property, being ancillary thereto, could only derive from the Limited Waiver. In fact, in response to the dissent's suggestion that the majority rely on the "real action" exception instead of the Limited Waiver with respect to its assertion of jurisdiction over the Ambassador's property (*id.* at 20a), the majority responded: "The dissent suggests a ground for jurisdiction that was not argued by either party in this court. In our view, we

lack either a factual or legal basis for exploring it in this case." (*Id.* at 14a n.11). Because the Limited Waiver was the basis for the majority's assertion of jurisdiction over the Ambassador's property and was thereby plainly violated, the decision will have all of the devastating international repercussions that the United States itself has stated will inevitably ensue.

But even if it is assumed that the government's approach of postulating unarticulated rationales for facially troubling decisions is proper, both of the government's alternative rationales are wrong. In this regard the United States first asserts that, even if the Connecticut Supreme Court relied on the Limited Waiver, "the decision goes no further than to indicate that *a waiver may make applicable an exception to immunity from jurisdiction in the Vienna Convention itself* . . . [*i.e.*] the real action exception . . ."[1] (*amicus* at 13 (emphasis added)). Consequently, the United States declares that "*the decision could not*, under any reading, *support a state's use of a limited waiver to find broader jurisdiction not covered by an express provision of the Vienna Convention.*" (*Id.* (emphasis added)). The confusion in this assertion becomes apparent in light of the United States' own statements regarding Article 31 and the claims of Mrs. Fernandez in this case. In this regard, the United States acknowledges that:

> 1. "[T]he drafters of the Convention clearly intended that divorce actions would be within the general grant of immunity for 'civil' actions . . ." (*id.* at 18 n.26).
>
> 2. The "real action" exception should apply, at its core, to actions "brought to settle title . . . in real property, against the whole world or particular persons, based on *pre-existing* claims of property rights." (*Id.* at 17 (emphasis added)).
>
> 3. Mrs. Fernandez's divorce claim to the property does not involve such a "traditional, pre-litigation property

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1 Ironically, the Ambassador has never maintained that Mrs. Fernandez would need a waiver to implement this exception to immunity—the Convention itself provides for it.

right," but rather an attempt to *acquire* property "by reference to general equitable principles *unrelated to the property itself.*" (*Id.* at 18 (emphasis added)).

Mrs. Fernandez has never claimed she presently has any legal or beneficial interest to the *entirety* of the property. Indeed, to the contrary, she has clearly stated that, at best, she has only a partial interest. Consistent with that position, she recognized in her complaint in this matter that Ambassador Fernandez has a "legal and beneficial" interest in the property. What she is seeking in this action, however, is not an adjudication of her claimed partial, "pre-litigation" interest in the property pursuant to section 31(1) of the Vienna Convention, but rather, as recognized by the dissent below, an "*assignment* to [her] of *all of [the Ambassador's]* right, title and interest in [the property] *pursuant to [General Statutes] § 46b-81.*" (Pet. App. at 17a (emphasis added)). She is not seeking an *in rem* adjudication or vindication of *her* partial title—she is seeking a *divorce based aggrandizement* of her alleged interest in the property by a transfer of the Ambassador's interest in the property to her. And this aggrandizement, for which there is no basis whatsoever in the "real action" exception, is precisely what the Connecticut Supreme Court allowed stating: "On remand, then, it is for the trial court to determine whether to grant the plaintiff title to the disputed real property."[2] (*Id.* at 14a). The only way the court could have reached this result was by allowing a divorce based claim for an assignment of property to proceed—a claim with respect to which the Ambassador retained his immunity—under the guise of an independent real action proceeding.

While Mrs. Fernandez may have the right to bring a separate proceeding under Article 31(1), that Article does not provide,

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2 If the effect of the Connecticut Supreme Court's decision was simply to permit the adjudication of an Article 31(1) real action claim, as suggested by the United States, all that Mrs. Fernandez would be entitled to at the conclusion of the proceeding would be a determination of whatever interest she already may have in the property. This correct understanding was articulated by the dissent below. (Pet. App. at 20a-21a).

by any stretched reading, an independent basis for an enhancement of a party's interest in property based on a *dissolution of a marriage.*[3] Contrary, then, to the government's conclusion that the decision "could not support a state's use of a limited waiver to find broader jurisdiction not covered by an express provision of the Vienna Convention," the decision of the Connecticut Supreme Court does precisely that!

The second major error of the United States in denying the significance of the Limited Waiver in the decision of the Connecticut Supreme Court is its claim that the waiver was significant "only because [it] supplied the necessary substantive predicate (dissolution) for Mrs. Fernandez to raise her claim to property upon dissolution." (*Amicus* at 13). The government then postulates that, because the "substantive predicate" of dissolution could have been obtained in some other unexplained fashion, Mrs. Fernandez still could have litigated her divorce claim to the property in Connecticut under the "divisible divorce" doctrine. (*Id.* n.18)

In making its divisible divorce argument, the government suggests that "*perhaps*" Mrs. Fernandez could obtain an *ex parte* divorce in some other jurisdiction and, then, adjudicate her divorce-based property claims against the Ambassador in Connecticut. The government, as it must, then attempts to distinguish *Taylor v. Taylor*, 168 Conn. 619, 362 A.2d 795 (1975)—a decision which plainly disallowed such a secondary divorce-based property litigation—by claiming that the case was decided under a prior statute. It fails in this endeavor, however, because both the earlier and the present statutes specifically provide that any award of property must be made by the court that entered the decree dissolving the marriage. Moreover, in its earlier brief to the Connecticut Supreme Court,

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3 Indeed, as recognized by the dissent below, not only does the real action exception not provide such an independent basis for enhancing a present interest, Mrs. Fernandez is "*barred* by the Convention . . . from enhancing whatever interest in the residence she may presently possess . . . ." (Pet. App. at 19a (emphasis added)).

and inconsistent with its position before this Court, the United States recognized that, "in the absence of a waiver of diplomatic immunity, the Vienna Convention bars divorce actions." (*Amicus* at 3 n.4). Clearly this is true in all United States jurisdictions absent a decision voiding, on constitutional grounds, the Vienna Convention's extension of diplomatic immunity to divorce cases. This the Connecticut Supreme Court refused to do, specifically stating that because of the Limited Waiver, it did not have to extend the analysis of *Boddie v. Connecticut*, 401 U.S. 371 (1971), and address the otherwise necessary issue of voiding the Vienna Convention's extension of diplomatic immunity to divorce actions on constitutional grounds.[4]

The Limited Waiver was *the* vehicle upon which jurisdiction was based. It clearly prohibited its use as a jurisdictional basis for a divorce award of property. The Connecticut Supreme Court, however, after relying upon the Limited Waiver for jurisdiction, has authorized the trial court on remand to absolutely disregard the clear prohibition of the Limited Waiver.

In spite of the extraordinary and inexplicable efforts of the United States to sanitize the decision of the Connecticut Supreme Court,[5] the decision is the only reported decision of which petitioner is aware in which the intent of a limited waiver has been patently disregarded. Any suggestion that this case will

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4 Moreover, it is far from clear that an *ex parte* divorce obtained outside the United States would even be recognized. Even if such an *ex parte* divorce could be obtained and even if it were to be recognized under principles of international comity, a divorce based award of property would still necessitate the same personally intrusive proceedings described above. Conn. Gen. Stat. § 46b-81.

5 The government's brief in its description of the decision of the Connecticut Supreme Court is marked by a proverbial flood of speculative qualifiers such as: "we do not believe that the opinion *needs to be read* . . ." (*amicus* at 10 (emphasis added)); "the Connecticut Supreme Court's reference to the waiver of immunity *need not, in our view*, be understood . . ." (*id.* at 13 (emphasis added)); "Under this interpretation, *which we think is a plausible one* . . ." (*id.* at 14 (emphasis added)); "We believe the Connecticut Supreme Court *may have been thinking* . . ." (*id.* at 14 n.19 (emphasis added)); "the state supreme court *might well hold* . . ." (*id.* at 19 (emphasis added)).

not interfere with the granting of limited waivers in the future is ludicrous.[6]

2. The United States Misrepresents The Inescapable Intrusiveness Of The Proceedings That Would Occur On Remand

The United States is aware that divorce actions are precluded by the general rule of diplomatic immunity set forth in Article 31 because of the very intrusiveness of such proceedings. Nevertheless, the United States would apparently have this Court believe that a divorce award of the Ambassador's interest in the

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6 The assertion to that effect in this case is particularly galling in light of the fact that the issuance and effect of a Limited Waiver was discussed between representatives of the United States Department of State and counsel for Ambassador Fernandez before the Limited Waiver was issued. The Limited Waiver was intended to permit the State Department to participate in this proceeding without the embarrassment of having to support a total dismissal of a divorce action against a United States citizen and was submitted to the Department of State for that sole purpose.

In its brief, the United States has underscored the importance of limited waivers in international relations and stressed that, because of their significance, implications of waivers must be avoided—"[A] receiving state [must] strictly adhere to the terms of any waiver of immunity." (*Amicus* at 11-12). Against this backdrop, the United States then dissects the Limited Waiver in this case, noting that:

> The court did not find jurisdiction that violated an *express condition* of the waiver: although the waiver reflects an *assumption* that the Connecticut courts would only dissolve the marriage, the waiver *merely defined* what immunity was being waived. Accordingly, *the waiver does not by its terms preclude* the exercise of any such *additional* jurisdiction that has another lawful basis; nor is the waiver *by its terms* rendered inoperative by the assumption of such jurisdiction.

(*Id.* at 11 n.13 (emphasis added)).

Such a casuistical approach to the Limited Waiver in this case—a waiver that was induced by the United States—surely can not be regarded as reassuring to nations that may consider the use of limited waivers in the future and is hardly fair to the country that issued it here. Are foreign governments with different procedural and juridical regimes to be required to precisely predict all of the vicissitudes of the local law of the receiving state or are the waivers they send entitled to be read with plain common sense and interpreted as clearly intended?

property pursuant to section 46b-81 of the Connecticut General Statutes in a proceeding under the "real action" exception to the general rule of immunity set forth in Article 31 "*might*" not be too invasive. In this regard, the United States writes that section 46b-81 "*allows* the trial court, in determining what property to assign . . . to consider 'the length of the marriage, the causes for the . . . dissolution . . . , the age, health, station, occupation . . . of the parties . . . .' " (*Id.* at 9 n.10 (emphasis added)). And continues that a proceeding under that section "*may* also raise *nettlesome practical questions*, such as whether, . . . the court must inquire into the *overall* holdings of the parties." (*Id.* at 19 n.30 (emphasis added)). Then, in conclusion, the United States suggests that "the Connecticut Supreme Court *has not foreclosed the possibility* that judicial inquiry in applying Conn. Gen. Stat. § 46b-81 (1986) should, in light of the Vienna Convention, be more limited than usual." (*Id.* at 20).

To shirk its responsibilities to the Ambassador of a foreign sovereign nation and the foreign nation itself with such misleading suggestions is shocking.[7] Section 46b-81 is clear and the government knows it. It does not merely "allow" a "nettlesome" consideration of the statutory criteria—it mandates that the trial court "SHALL" consider all of the personally invasive factors prescribed by that statute in making an award of property. *Leo v. Leo*, 197 Conn. 1, 5, 495 A.2d 704, 707 (1985). Nor is there any suggestion anywhere in the opinion of the Connecticut Supreme Court of even the remotest possibility of a "more limited" inquiry on remand or of the authority of the court to do so in light of the statutory mandate.

In the same misleading fashion, the government, while conceding that the decision below is final for purposes of appeal "because the defense is one of *immunity*," then digresses and speculates in an inconsistent and irrelevant fashion that "it is *not entirely clear* whether the trial court, on remand, would

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7 *Cf.* Article 29 of the Vienna Convention (providing that a receiving state "shall treat [the diplomatic agent] with due respect and *shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*" (Emphasis added)).

actually reach the equitable-distribution inquiry that raises the most troubling questions under the Vienna Convention." (*Amicus* at 10).

What is singularly at issue in this case is not whether or not the Ambassador might prevail with respect to his property, but whether or not diplomatic immunity precludes *his being subjected to a suit in the first place.* This matter hinges on a *claim of diplomatic immunity.*[8] If this matter is reviewed now and the Ambassador's interpretation of Article 31 is found to be correct, there will be no further proceedings in this matter.[9] If the matter is not reviewed now, Ambassador Fernandez would be faced with the same draconian choice that confronted the appellants in *Shaffer v. Heitner*, 433 U.S. 186, 196 n.12 (1977). He would "have the choice of suffering a default judgment or entering a general appearance and defending on the merits." It was with respect to cases like this that this Court has found finality in the past observing that such an entitlement to immunity from suit "*is effectively lost if a case is erroneously permitted to go to trial* . . . . in each case, the district court's decision is effectively unreviewable on appeal from a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (emphasis added).

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8 In footnote 12 of its brief, the United States suggests that based on "government records," the Ambassador would not have been entitled to immunity in this case until recently. Presumably the records in question are those of the Immigration and Naturalization Service, which are not part of the record in this case. Nevertheless, petitioner's diplomatic status is recognized by the United States Department of State, the People's Republic of Mozambique and the courts of Connecticut and is not in issue in this appeal.

9 *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 482-83 (1975).

CONCLUSION

For all the above reasons, as well as those set forth in his petition, Ambassador Fernandez respectfully requests that this Court grant certiorari.

Respectfully submitted,

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